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Supreme Court, U.S.
FILED

(1) 07-09 JUN 28 2007

No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON, FRANCIS VANER JOHNSON, and JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated that the controlling view in this Court's split decisions is "that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" (emphasis added). In putative reliance on *Marks*, the Seventh and Ninth Circuits have held that the controlling opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), is the lone concurrence and that Clean Water Act jurisdiction *must* be based on Justice Kennedy's broad and undefined "significant nexus" test. Those circuits have therefore prohibited federal agencies from relying on the narrower plurality decision in *Rapanos* to establish Clean Water Act jurisdiction. In this case, the First Circuit held that the Seventh and Ninth Circuits are wrong and that Clean Water Act jurisdiction may be established based on *either* the Kennedy test or the plurality test.

In *Rapanos*, which opinion is controlling—the broad stand alone concurrence of Justice Kennedy, or the narrower opinion of the four Justice plurality as suggested by *Marks*? Or, may the courts simply adopt an either/or test of conflicting standards for establishing federal jurisdiction under the Clean Water Act?

LIST OF ALL PARTIES

Petitioners: Charles Johnson, Genelda Johnson, Francis Vaner Johnson, and Johnson Cranberries, LLP.

Respondents: United States of America.

CORPORATE DISCLOSURE STATEMENT

Johnson Cranberries, LLP, is wholly owned by Petitioners Charles Johnson and Genelda Johnson. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The challenged remand order of the Court of Appeals for the First Circuit is reported as *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), and is attached as Appendix (App.) C.

JURISDICTION

The remand order of the Court of Appeals for the First Circuit was entered on October 31, 2006. App. C. That court's denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on February 21, 2007. App. A. On May 3, 2007, this Court granted an extension of time in which to file this Petition for Writ of Certiorari to and including June 28, 2007. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use,

degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a five Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the Clean Water Act based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four Justice

plurality interpreted the Clean Water Act narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands "indistinguishable" from these waters. But Justice Kennedy, who concurred in the judgment, interpreted the Act broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters.

The Circuit Courts of Appeals are themselves split on how to apply this Court's *Rapanos* decision. Recently, in *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), (petition for cert pending) (No. 06-1331), the Seventh Circuit held Justice Kennedy's "significant nexus" test was controlling. The Ninth Circuit came to the same conclusion in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (petition for rehearing pending). But, the First Circuit expressly rejected this reading of *Rapanos*. In this case, the First Circuit held that Clean Water Act jurisdiction could be extended to inland wetlands based on *either* the plurality test *or* Justice Kennedy's "significant nexus" test.

These Circuit rulings conflict with this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality position because it is a logical subset of the Kennedy test. But not all courts follow a literal reading of *Marks*. Indeed, there is general disagreement among the Circuits as to whether and how *Marks* applies to this Court's split decisions.

Review by this Court is necessary not only to resolve a clear and substantial conflict among the Circuit Courts as to enforcement of the Clean Water Act under *Rapanos*, but also to clarify this Court's interpretive rules for split opinions.

STATEMENT OF THE CASE

Petitioners (Johnsons) were cited for filling private wetlands without a federal permit under the Clean Water Act while converting their land to use as cranberry bogs—a recognized form of wetland. In defense, the Johnsons challenged the government's statutory jurisdiction. A fractured panel of the First Circuit upheld federal jurisdiction over the Johnsons' wetlands citing a "hydrological connection" to traditional navigable waters, although none of the panelists could agree on the nature of that connection. *See United States v. Johnson*, *see* Appendix D. Shortly thereafter, this Court invalidated that basis for jurisdiction in *Rapanos*.

In *Rapanos*, a five-justice majority of this Court held that something more than a "hydrological connection" between a wetland and a navigable-in-fact waterway was required for the exercise of federal jurisdiction under the Clean Water Act. But, no single rationale garnered a majority vote. As noted above, four Justices, forming a plurality, determined the Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters. *Rapanos*, 126 S. Ct. at 2225 (Scalia, J.). The plurality would also authorize federal regulation of wetlands physically abutting these water bodies, but *only if* they contain a continuous surface water connection such that the wetland and the covered water are "indistinguishable." *Id.* at 2234. Ephemeral and insubstantial connections would not suffice. *Id.* at 2225. Justice Kennedy concurred in the judgment but proposed a broad and undefined "significant nexus" test for determining federal Clean Water Act jurisdiction. *Id.* at 2236 (Kennedy, J., concurring in the result). Under this test, any wetland would be subject to federal regulation if it is deemed to "significantly

affect" a traditional navigable waterway. *Id.* at 2248. The four Justices in the dissent supported the government's view that the agencies could choose to regulate essentially any water body to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," *id.* at 2252, *et seq.* (Stevens J., dissenting), but added that they would uphold federal jurisdiction in any case "in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 2265.

In reliance on *Rapanos*, the Johnsons petitioned the First Circuit for rehearing. In response, the court vacated its prior decision and remanded with directions on how to apply the *Rapanos* decision. App. C. As a basis for choosing among this Court's disparate opinions, the First Circuit turned to the language in *Marks* directing the lower courts to rely on "that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" 430 U.S. at 193 (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). But although the plurality and Justice Kennedy are the only members of the Court "who concurred in the judgments," the panel expressly rejected the Seventh and Ninth Circuit's adoption of the Kennedy test and instead followed the dissent's approach that authorizes federal regulation of wetlands if "either the plurality's or Justice Kennedy's test is satisfied." App. at C-17.

Thus the First Circuit created a conflict with its sister Circuits and misconstrued this Court's rule for interpreting split decisions.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION MAY EXTEND TO WETLANDS BASED ON EITHER THE *RAPANOS* PLURALITY TEST OR THE KENNEDY "SIGNIFICANT NEXUS" TEST

In this case, the First Circuit expressly rejected the Seventh Circuit's (and by implication the Ninth Circuit's) understanding of and reliance on *Marks v. United States*, 430 U.S. 188, to interpret this Court's *Rapanos* decision. In *Marks*, this Court was clear: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*' " 430 U.S. at 193 (emphasis added). Although this interpretive rule has been difficult in application, it has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153. In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be

applied to death penalty cases. Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. Thus in *Gregg*, this Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

In *Gerke*, 464 F.3d 723, which also involves a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule, and therefore the test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

Id. at 724.

This adulterated version of the *Marks* rule allowed the Seventh Circuit to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices

would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in this case found it curious that *Gerke* equated "narrowest grounds" with the opinion "least restrictive of federal authority." App. C-9. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id.* at C-12. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit in this case opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992). App. C-12 - C-13.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the First Circuit noted the D.C. Circuit found "*Marks* is

workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." App. at C-13. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* According to the First Circuit, *Marks* followed this approach. In *Marks* this Court examined *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that if materials are deemed obscene they should receive no First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, excluding obscene materials from First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992).

In this case, the First Circuit noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." App. at C-14. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of the Kennedy standard. This possibility was simply ignored. So broad is the Kennedy approach that the plurality found it barely distinguishable from the government's "any hydrological connection" test the majority struck down: "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." *Rapanos*, 126 S. Ct. at 2235 n.15.

Thus, in *Rapanos*, the plurality's jurisdictional standard is comparable to the narrower strict scrutiny standard, whereas the Kennedy "significant nexus" standard is comparable to the broader rational basis standard. As Justice Stevens observed, it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Id.* at 2265 n.14.

In other words, the plurality opinion was decided on the "narrowest grounds," not because it's the most restrictive of federal authority, but because it is less sweeping and would require the same outcome in a subset of the cases as would the more sweeping Kennedy opinion. For this reason, the First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," App. C-14, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as

laid out in *Rapanos*." App. C-17. This conflict creates a substantial disparity between these Circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.[1]

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

As the First Circuit points out, a number of Circuits have abandoned this Court's *Marks* approach to split opinions or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." App. at C-15. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'").

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[1]It addition to the Seventh Circuit in *Gerke*, the Ninth Circuit has also concluded, without explanation, that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos* under the *Marks* rule, thus creating an additional conflict among the Circuits. *See Northern California River Watch v. Healdsburg*, 457 F.3d at 1029 (currently on petition for rehearing).

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks*, that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in *Gerke*, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. The First Circuit in this case used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

App. at C-15.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, 950 F.2d 771, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " App. at C-15-C-16. The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." App. at. C-16.

This widespread Circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Marks*' inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE UNDEFINED "SIGNIFICANT NEXUS" STANDARD IMPOSED BY THE COURT BELOW RAISES DUE PROCESS CONCERNS

For more than 30 years, the Corps and EPA have failed to follow a consistent jurisdictional test under the Clean Water Act. A report from the General Accounting Office confirms that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf (last visited June 25, 2007) (GAO Report).

In addition to the inter-district inconsistences, the GAO Report concludes that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. In *Rapanos*, those decisions became the basis for multimillion dollar fines and criminal prosecution.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[2]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two were convicted in the Eleventh Circuit for filling "wetlands" on their

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[2] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the "significant nexus" test provides no such clarity. To the contrary, as the *Rapanos* plurality points out, "Justice Kennedy's 'significant nexus' standard is perfectly opaque. When, exactly, does a wetland 'significantly affect' covered waters, and when are its effects 'in contrast . . . speculative or insubstantial?'" *Rapanos*, 126 S. Ct. at 2235 n.15.

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during

significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id.* at 607-608. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id.* at 613. According to the court, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *Id.* (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id.* at 615. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

Thus, the "significant nexus" standard imposed by the court in *Gerke*, and authorized alternatively in this case, is sure to result in inconsistent and unpredictable applications of the law. Only the plurality test, with its clearer lines of demarcation, is likely to provide agency officials and the regulated public with consistent and predictable jurisdictional rules. As the dissent in this case observed, the "significant nexus" approach "leaves the door open to continued federal overreach" while the plurality's restriction on federal jurisdiction "strikes a constitutional balance" between federal power and individual rights. App. at. C-19 (Torruella, Circuit Judge, dissenting).

CONCLUSION

The First Circuit expressly rejected the holdings of the Seventh and Ninth Circuits that the Kennedy test is controlling under *Rapanos*. This created a direct conflict over federal wetland jurisdiction that must be resolved by this Court. The decision below also added to the substantial confusion among the Circuits as to how to apply *Marks* to this Court's split decisions. Inaction will result in continuing uncertainty as to Clean Water Act jurisdiction and undermine the Constitution's safeguards against arbitrary enforcement of the law.

DATED: June, 2007.

Respectfully submitted,

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Counsel for Petitioners

Appendix A-1

No. 05-1444

UNITED STATES COURT OF APPEALS,
FOR THE FIRST CIRCUIT

UNITED STATES,	)	
	)	
Plaintiff, Appellee,	)	ORDER OF
	)	COURT
v.	)	
	)	Entered:
CHARLES JOHNSON, GENELDA	)	February 21, 2007
JOHNSON, FRANCIS VANER	)	
JOHNSON, and JOHNSON	)	
CRANBERRIES, LLP,	)	
	)	
Defendants, Appellants.	)	
	)	

Before

Boudin, Chief Judge,
Torruella, Lynch,* Lipez,
and Howard, Circuit Judges,
DiClerico,** District Judge.

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc,

it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: /s/ MARGARET CARTER
Chief Deputy Clerk

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* Judge Lynch is recused and did not participate in the consideration of this matter.

** Of the District of New Hampshire, sitting by designation.

Appendix B-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 3, 2007

Mr. M. Reed Hopper
Pacific Legal Foundation
3900 Lennane Drive #200
Sacramento, CA 95834

Re: Charles Johnson, et al.
v. United States
Application No. 06A1031

Dear Mr. Hopper:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on May 3, 2007 extended the time to and including June 28, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Gail Johnson
Case Analyst

Appendix C-1

No. 05-1444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,	)	
	)	
Plaintiff-Appellee,	)	Heard Oct. 7, 2005.
	)	Decided
v.	)	Oct. 31, 2006.
	)	
Charles JOHNSON, Genelda Johnson, Francis Vaner Johnson, and Johnson Cranberries, LLP,	)	
	)	
Defendants-Appellants.	)	

* * *

Before TORRUELLA and LIPEZ, Circuit Judges, and DiCLERICO,* District Judge.

LIPEZ, Circuit Judge.

Following the panel's decision in this case, *see United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), appellants moved for rehearing en banc, noting the Supreme Court's grant of certiorari in *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004). We held their petition in abeyance pending a decision in that case. Following the decision in *Rapanos v. United States*, 547 U.S. ___, 126 S. Ct. 2208, 165 L. Ed.2d 159 (2006), appellants supplemented their previous petition. They request that we grant rehearing en banc to resolve the conflict between

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* Of the District of New Hampshire, sitting by designation.

the panel decision and *Rapanos*, or, alternately, that we vacate the decision with prejudice on the ground that the evidence in the record supports a judgment in their favor. The government filed a response requesting that we vacate our previous decision and remand to the district court. After careful consideration, we vacate and remand for further proceedings consistent with *Rapanos*, as described below.

I. The Panel Decision

This case began when the United States filed a civil action alleging that defendants (now appellants), a group of cranberry farmers in Carver, Massachusetts, had discharged pollutants into federally-regulated waters without a permit in violation of § 301 and § 502 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311, 1362. In response, appellants contended that the United States lacked jurisdiction over the three properties in question: (1) the Cross Street site; (2) the Fosdick Street site; and (3) the Forest/Fuller Street site (collectively, the "target sites").

In separate rulings on liability and remedy, the district court granted summary judgment in favor of the government. The district court denied appellants' motion for reconsideration, stating that "there is a sufficient basis for the United States to exercise jurisdiction because the undisputed evidence shows that the three wetlands are hydrologically connected to the navigable Weweantic River by nonnavigable tributaries."

In an appeal to this court, appellants challenged the district court's judgment that the jurisdiction of the CWA extends to the target sites. First, they asserted that their property is not covered by the Environmental Protection Agency ("EPA") regulation promulgated to carry out the CWA. In the alternative, appellants argued that, if their property is covered by the regulation, either the regulation exceeds the authority granted by the CWA, or the CWA exceeds Congress's authority under the Commerce Clause.

We affirmed the trial court's judgment in a divided decision, with two members of the panel concurring in the judgment for different reasons, and one member dissenting. One member of the majority concluded that the hydrological connection between the target sites and the Weweantic River establishes a "significant nexus" between the sites and the river, sufficient to establish jurisdiction under the CWA without creating constitutional issues under the Commerce Clause. For two of the target sites, in the view of this judge, the hydrological connection depended on diffusion of water through wetlands. *See* 437 F.3d at 162.

The other member of the majority read the record differently to conclude that the hydrological connection was a system of tributaries, some of which happened to flow through wetlands or other bogs. *See id.* at 182. The concurring panelist thus concluded that it was unnecessary to decide whether the diffusion of water through wetlands was a sufficient hydrological connection to support a "significant nexus." *Id.*

The dissent concluded that the United States "may not constitutionally regulate wetlands that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* at 187 (internal quotations and citation omitted). Moreover, even if the EPA's assertion of jurisdiction was constitutional, the dissent would have held that the government's attempt to assert jurisdiction over appellants' wetlands is inconsistent with its own regulations because the system of tributaries linking the target sites to the Weweantic includes other wetlands. Because the regulations explicitly exclude wetlands adjacent to waters that are themselves wetlands, the dissent argued that the government lacked jurisdiction under its own regulations. *Id.* at 187.[1]

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[1] The regulation states that "waters of the United States" include "[w]etlands adjacent to waters (other than waters that are themselves

(continued...)

II. Response to the Panel Decision

As noted, appellants filed a petition for rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, arguing that the case should be reheard following the Supreme Court's then-pending decision in *Rapanos*. We ordered appellants' petition held in abeyance pending the Supreme Court's decision in *Rapanos*. We further stated that appellants could file a supplemental petition for rehearing en banc within fourteen days after the decision in *Rapanos* was issued, and the government could then respond.

III. *Rapanos v. United States*

The decision in *Rapanos v. United States*, 547 U.S. ___, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006), resolved two consolidated cases from the Sixth Circuit. In one case, the United States brought an enforcement action alleging that property owners and their affiliated businesses deposited fill materials into wetlands without a permit, in violation of the CWA. *Id.* at 2219. In the other, property owners were denied a permit to deposit fill material in a wetland approximately one mile from a lake and, after exhausting their administrative appeals, they filed suit. *Id.*

In both cases, the district court found that there was federal regulatory jurisdiction over the sites in question, and the Sixth Circuit affirmed. The Supreme Court then consolidated the cases and granted certiorari to decide whether these wetlands constitute "waters of the United States" under the CWA, and, if so, whether the CWA is constitutional. *See id.* at 2220.

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[1] (...continued)
wetlands) identified in paragraphs (s)(1)-(6) of this section." 40 C.F.R. § 230.3(s)(7).

The Court issued a split decision construing the phrase "waters of the United States" as used in the CWA. The plurality concluded that the phrase "waters of the United States" includes only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 2225. Thus, for purposes of determining federal regulatory jurisdiction, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 2226 (emphasis in original). The plurality vacated the decision of the Sixth Circuit in both cases and, noting "the paucity of the record," remanded for further proceedings. *Id.* at 2235.

Justice Kennedy concurred in the judgment, but rejected the plurality's rationale. Instead, he concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236. Justice Kennedy further found that wetlands "possess the requisite nexus" if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248. Where the wetlands in question are "adjacent to navigable-in-fact waters, [the government] may rely on adjacency to establish its jurisdiction." *Id.* at 2249. Where the wetlands are adjacent to nonnavigable tributaries, "[a]bsent more specific regulations . . . [the government] must establish a significant nexus on a case-by-case basis." *Id.* at 2249.

Justice Stevens authored a dissent joined by three other Justices. In the view of the dissenters, to the extent that the CWA includes a "significant nexus" requirement, this requirement "is categorically satisfied as to wetlands adjacent

to navigable waters or their tributaries." *Id.* at 2263-64. The dissent concluded by noting specifically that "all four Justices who have joined this opinion would uphold the Corps' jurisdiction . . . in all other cases in which either the plurality's or Justice Kennedy's test is satisfied. . . ." *Id.* at 2265.

IV. Subsequent Motions

Following the Supreme Court's decision in *Rapanos*, appellants filed a supplemental petition for rehearing en banc challenging the view in one of the panel opinions that a hydrological connection constitutes a jurisdictionally sufficient "significant nexus." Appellants contend that rehearing is necessary to resolve the tension between the panel opinion and *Rapanos*. They argue that under either the plurality opinion or Justice Kennedy's concurrence, a hydrological connection is insufficient to establish jurisdiction, although they also argue strenuously that the plurality's test alone should apply. Alternatively, appellants contend that the evidence in the record is sufficient to support a finding in their favor under the standards in *Rapanos*, and urge that we vacate the decision and direct the district court to enter judgment for them.

The United States opposes the petition for en banc review and urges us instead to vacate the panel's decision and remand the case to the district court. The government argues that additional factfinding is necessary before the legal principles articulated in *Rapanos* can be applied in this case. Moreover, the government asserts that on remand it should be allowed to establish CWA jurisdiction under either the *Rapanos* plurality's test or Justice Kennedy's test.

V. Remand to the District Court

We agree with the government that remand to the district court for application of the *Rapanos* standards is appropriate. The parties presented their cases in the district court without any awareness of the standards that now apply. They should

now have an opportunity to develop their positions in the district court with an awareness of these standards. However, the question of what legal standard to apply is one of some complexity, and other courts have taken varying approaches to the issue. We conclude that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality. We explain our reasoning.

A. Other Courts' Application of *Rapanos*

In the months since *Rapanos*, four courts have applied its legal standards—two district courts and two courts of appeals.

1. Decisions of District Courts

In *United States v. Evans*, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006), the Middle District of Florida adopted Justice Stevens's suggestion to apply either the plurality's or Justice Kennedy's standard. That court cited the Supreme Court's decision in *Marks v. United States* for the proposition that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Evans* at *19 (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)). The court noted that "'narrowest grounds' is understood as the 'less far-reaching' common ground," *Evans* at *19 (citing *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001)), but found that because the plurality and Justice Kennedy articulated different standards for application on remand it was unclear which would control. Hence, the court adopted Justice Stevens's approach. *Evans* at *19.

The Northern District of Texas used a sharply contrasting approach in *United States v. Chevron Pipe Line Co.*, 437

F. Supp. 2d 605 (N.D. Tex. 2006), determining that because of the lack of a clear legal standard in *Rapanos*, it would instead rely on precedent within its own circuit. The court noted that "the Supreme Court failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA." It added that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *Id.* at 613 (internal citation omitted). The court then concluded:

> Because Justice Kennedy failed to elaborate on the "significant nexus" required, this Court will look to the prior reasoning in this circuit. The Fifth Circuit, as discussed above, has interpreted "the waters of the United States" narrowly under the OPA. Without any clear direction on determining a significant nexus, this Court will do exactly as Chief Justice Roberts declared—"feel [its] way on a case-by-case basis."

Id. The court did not discuss Justice Stevens's instruction.

2. Decisions of Courts of Appeals

The Ninth Circuit, the first circuit court to apply *Rapanos*, concluded without analysis that Justice Kennedy's concurrence provides the controlling test. *No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006). The court stated:

> Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as

> that position taken by those Members who concurred in the judgments on the narrowest grounds.").

Id. at 1029. Without further discussion, the Ninth Circuit applied Justice Kennedy's test. The court did not acknowledge Justice Stevens's instruction.

Most recently, in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), the Seventh Circuit also found that Justice Kennedy's test is controlling without discussing Justice Stevens's instruction. The court paraphrases *Marks v. United States*:

> When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

Id. at 724 (citing *Marks*, 430 U.S. at 193, 97 S. Ct. 990). Curiously, without explanation, the court equates the "narrowest opinion" with the one least restrictive of federal authority to regulate. It states:

> The plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that "Justice Kennedy tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again."
>
> . . .
>
> [Justice Kennedy's] test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that "by saying the Act covers

> wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."

Id. at 724, 725 (quoting *Rapanos*, 126 S. Ct. at 2234 n.15 & 2246) (emphasis added). *Gerke* concludes by acknowledging the following anomaly: If Justice Kennedy finds federal jurisdiction over a particular site using the "significant nexus" test the four dissenters would also find jurisdiction. However, if Justice Kennedy does not find federal jurisdiction, there could be instances where both the plurality and the dissent disagree with his conclusion. *Id.* at 724-25. In other words, there could be a case in which Justice Kennedy

> would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the *Rapanos* dissenters when the balancing approach of Justice Kennedy favors the landowner.

Id. However, *Gerke* writes off this "rare case," concluding that "as a practical matter the Kennedy concurrence is the least common denominator." *Id.*

B. Interpretation of *Marks*

The *Marks* directive that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks*,

430 U.S. at 193, 97 S. Ct. 990 (internal citation omitted), has proven troublesome in application for the Supreme Court itself and for the lower courts. Therefore, the genesis of that directive and its application require scrutiny.

In *Marks*, the defendant raised a Due Process challenge to his obscenity conviction on the grounds that he had been punished retroactively under a definition of obscenity laid out in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), when he had actually engaged in the punished conduct prior to the Miller decision. The "narrowest grounds" approach emerged when the Court examined Miller's predecessor, *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), to determine whether the law had provided fair warning at the time of the defendant's conduct. *Marks*, 430 U.S. at 193-94, 97 S. Ct. 990. In *Memoirs*, a majority of the Supreme Court found that a lower court erred in finding a book obscene and thus unprotected by the First Amendment. However, three Justices felt that materials would not be protected by the First Amendment if they were deemed obscene, *Memoirs*, 383 U.S. at 418, 86 S. Ct. 975 (Brennan, J.), while two other Justices insisted that the First Amendment provides an absolute shield against government action aimed at suppressing obscenity. *Id.* at 421, 86 S. Ct. 975 (Black, J., concurring); *id.* at 426, 86 S. Ct. 975 (Douglas, J., concurring). *Marks* concluded that the opinion excluding obscene materials from First Amendment protection was the "narrowest grounds" for the judgment in *Memoirs*.

Relatedly, the "narrowest grounds" language of Marks is itself a quotation from a previous Supreme Court case, *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). *Gregg* discusses *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), which examined the constitutionality of the death penalty as imposed under a Georgia statute. In *Furman*, five Justices agreed that the death

penalty was unconstitutional as imposed in the case. However, two of these Justices believed that capital punishment was unconstitutional per se, while the other three Justices felt that the death penalty was unconstitutional under the conditions present in the cases before the court but did not necessarily agree that capital punishment was per se unconstitutional. *Gregg* concluded: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." 428 U.S. at 169 n.15, 96 S. Ct. 2909.

In sum, the cases on which *Marks* directly relies both involve situations in which the "narrowest ground" was also the ground least restrictive of federal jurisdiction, as the Seventh Circuit indicated in *Gerke*. However, this coincidence does not necessarily mean that the Supreme Court in *Marks* equated the "narrowest grounds" of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority. Such an equation leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party. Moreover, given the underlying constitutional question presented by *Rapanos*, it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause. *See Rapanos*, 126 S. Ct. at 2224 (plurality opinion). The appellants argue for that result here.

As an alternative to the Seventh Circuit's reading of *Marks*, one might sensibly conclude, as one court has, that the "narrowest grounds" are simply understood as the "less far-reaching-common ground." *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001); *see also* Mark Alan Thurmon, Note, *When the Court Divides:*

Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 Duke L.J. 419, 420-21 (1992) (quoting Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 763 (1980)) ("One way to determine the 'narrowest grounds' is to look for the opinion 'most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules.'"). This reading is also consistent with *Memoirs* and *Furman*: in both cases, the opinion deemed "narrowest" was the one more closely tailored to the specific situation the Court confronted.

Even if we take this more sensible approach to *Marks*, however, the case still poses problems in the situation before us. As the D.C. Circuit held in an en banc opinion, "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). In other words, the "narrowest grounds" approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other. When applied to future cases, the less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would. For example, in *Furman*, the Justices who concluded that capital punishment was per se unconstitutional would always strike down future death penalty sentences, but the Justices who found only that the death penalty was unconstitutional as administered in *Furman* would only strike down capital sentences in a subset of future capital cases. Similarly, in *Memoirs*, the absolutist view of the First Amendment held by two Justices would always require a ruling in favor of protecting speech, but the view of three other Justices that only non-obscene speech is protected would extend First Amendment protection only to a subset of such cases.

Thus, the less sweeping opinion in each case represents the "narrowest grounds" for the decision.

This understanding of "narrowest grounds" as used in *Marks* does not translate easily to the present situation. The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction. As *Gerke* points out, in cases where there is a small surface water connection to a stream or brook, the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus. In such a case, if Justice Kennedy's test is the single controlling test (as advocated by the Seventh and Ninth Circuits), there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation. This possibility demonstrates the shortcomings of the *Marks* formulation in applying *Rapanos*.

C. The *Rapanos* Dissent's Approach

Justice Stevens foresaw the possibility that the plurality might find jurisdiction in some cases where Justice Kennedy does not. His instruction to find jurisdiction where either test is satisfied provides a simple and pragmatic way to assess what grounds would command a majority of the Court. Justice Stevens observes:

> I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future

> cases the United States may elect to prove jurisdiction under either test.

Rapanos, 126 S. Ct at 2265 n.14. Following Justice Stevens's instruction ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding. If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction. Other circuits have previously taken this common sense approach to fragmented opinions. *See, e.g., Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) ("In essence, what we must do is find common ground shared by five or more justices."); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree." (internal quotation marks and citations omitted)).

We note that one circuit court has previously reached a conclusion at odds with the position Justice Stevens now advocates. In *King v. Palmer*, the D.C. Circuit stated that "we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d at 783. *King* discussed *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987) (*Delaware Valley II*), in which the Supreme Court considered the availability and amount of contingency fees under federal fee-shifting statutes. In *Delaware Valley II*, the Court ultimately issued a plurality opinion signed by four Justices, a dissent signed by four Justices, and a concurrence by Justice O'Connor. The D.C. Circuit refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks*'s language that the holding is the position of the Justices

"who concurred in the judgments on the narrowest grounds," *Marks*, 430 U.S. at 193, 97 S. Ct. 990 (emphasis added), as well as the fact that the Supreme Court had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined. *King*, 950 F.2d at 783.

However, the situation in *King* is different from the case before us. In *Delaware Valley II*, Justice O'Connor and the dissenting Justices simply took different approaches to the question of how to calculate a contingency enhancement, with the result that it is not immediately obvious how their views could be combined to form a five-Justice majority. In *Rapanos*, Justice Stevens states that whenever either the plurality or Justice Kennedy would find jurisdiction, the *Rapanos* dissenters would agree. Moreover, the Third Circuit took a position opposite to that of the D.C. Circuit in interpreting *Delaware Valley II*, holding that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the court." *Student Pub. Interest Research Group of N.J., Inc. v. AT & T Bell Labs.*, 842 F.2d 1436, 1451 (3d Cir. 1988). Therefore, we do not share the reservations of the D.C. Circuit about combining a dissent with a concurrence to find the ground of decision embraced by a majority of the Justices.

Moreover, Justice Stevens's instruction seems particularly sound given that the Supreme Court itself has moved away from the *Marks* formula. In *Nichols v. United States*, the court observed that "[t]his test is more easily stated than applied," adding, "[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." 511 U.S. 738, 745-46, 114 S. Ct. 1921, 128 L. Ed.2d 745 (1994); *see also Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (quoting *Nichols* for the same proposition). Since *Marks*, several members of the Court have indicated that whenever a decision is fragmented such that no

single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced. *See Waters v. Churchill*, 511 U.S. 661, 685, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the test that lower courts should apply); *League of United Latin Am. Citizens v. Perry*, ___U.S. ___, 126 S. Ct. 2594, 2607, 165 L. Ed. 2d 609 (2006) (Kennedy, J.) (analyzing *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) to find that agreement among one concurring and four dissenting Justices establishes majority support for a legal proposition); *Alexander v. Sandoval*, 532 U.S. 275, 281-82, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (Scalia, J.) (noting the agreement of five Justices who joined plurality and various dissenting opinions). Thus, it is not surprising that Justice Stevens in his *Rapanos* dissent explicitly directs courts to examine the views of dissenting Justices to determine which propositions have the support of a majority. This approval is consistent with the direction that the Court as a whole has taken since *Marks*. Moreover, the fact that Justice Stevens does not even refer to *Marks* indicates that he found its framework inapplicable to the interpretation by the lower courts of the divergent tests laid out by the opinions in *Rapanos*.

VI. Conclusion

The foregoing considerations lead us to conclude that the district court should do exactly as Justice Stevens has suggested. The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*.

In light of these standards, the district court may conduct additional factfinding if it deems it necessary to address the jurisdictional question. The district court may also address any

other issues it deems necessary in deciding that jurisdictional issue. As discussed previously, the two members of the majority each had different interpretations of the record. We urge the parties and the district court to provide a clear factual record in the context of applying the new standards.

Accordingly, we vacate our decision in *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), and remand for further proceedings. Each party is to bear its own costs.

So ordered.

TORRUELLA, Circuit Judge (Concurring in part, Dissenting in part).

I join the majority in remanding the case to the district court so that the new legal standards developed in *Rapanos v. United States*, 547 U.S.___, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006), can be applied on the first instance by that court after the parties have had an opportunity to expand the record to the extent necessary given the new standards. The opportunity to expand the record is important to both the government and the Johnsons. New evidence is as likely to militate against federal regulatory jurisdiction over the Johnsons' property as it is to demonstrate it.

I depart from the majority in interpreting what standards *Rapanos* has established. The plurality's "hydrological connection" test provides the proper constitutional limit on federal regulation under the Clean Water Act. Although the majority has provided an able analysis of a thorny issue, I cannot concur that Justice Kennedy's seemingly opaque "significant nexus" test is a constitutional measure of federal regulatory jurisdiction. Extending regulatory jurisdiction to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made . . ." *id.* at 2236, leaves the door open to continued federal overreach. The plurality's restriction of federal jurisdiction to "*only* those

wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water] Act . . ." *id.* at 2226 (emphasis in original), strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their property in accordance with their dreams and aspirations, whether economic or otherwise.

Appendix D-1

No. 05-1444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,	)	
	)	
Plaintiff-Appellee,	)	Heard Oct. 7, 2005.
	)	Decided
v.	)	Feb. 13, 2006.
	)	
Charles JOHNSON, Genelda Johnson, Francis Vaner Johnson, and Johnson Cranberries, LLP,	)	
	)	
Defendants-Appellants.	)	

* * *

Before TORRUELLA and LIPEZ, Circuit Judges, and DiCLERICO,* District Judge.

LIPEZ, Circuit Judge.

In December 1999, the United States filed a civil action against Defendants, claiming that they had discharged pollutants into federally-regulated waters without a permit in violation of provisions of the Clean Water Act in the operation of their cranberry farm. Defendants challenged the United States' jurisdiction over the properties in question. In separate rulings on liability and remedy, the district court granted

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* Of the District of New Hampshire, sitting by designation.

summary judgment in favor of the government, reasoning that "there is a sufficient basis for the United States to exercise jurisdiction because the undisputed evidence shows that the three wetlands [the Johnsons' properties] are hydrologically connected to the navigable Weweantic River by nonnavigable tributaries."

Defendants appeal the district court's judgment that the jurisdiction of the Clean Water Act extends to their property. They assert that their property is not covered by the regulation promulgated by the Environmental Protection Agency (the "EPA") in conjunction with the United States Army Corps of Engineers (the "Corps"), to carry out the mandate of the Clean Water Act, as interpreted by the EPA and the Corps. In the alternative, if their property is covered by the regulation, Defendants contend that either the regulation exceeds the authority granted by the Act, or the Act exceeds Congress' authority under the Commerce Clause. These contentions require us to determine whether the government's exercise of jurisdiction over the three parcels of land at issue complies with constitutional, statutory, and regulatory requirements. This opinion concludes that it does.

I.

A. Standards of Review

Review of a district court's grant of summary judgment is *de novo*. *Johnson v. Gordon*, 409 F.3d 12, 16 (1st Cir. 2005). Review of an agency's interpretation of the statute that it administers is also *de novo*, subject to established principles of deference. *See Perez-Olivio v. Chavez*, 394 F.3d 45, 48 (1st Cir. 2005). Constitutional challenges to a statute are also reviewed *de novo*. *United States v. Lewko*, 269 F.3d 64, 67 (1st Cir. 2001).

B. Procedural Background

The United States (or "the government") brought this action in November 1999 to address alleged violations of the Clean Water Act (the "CWA" or the "Act"), 33 U.S.C. § 1241, *et seq.*, by a group of cranberry farmers—Charles Johnson, Genelda Johnson, Francis Vaner Johnson, and Johnson Cranberries, Limited Partnership (collectively, the "Johnsons" or "Defendants"). It asserted that the Johnsons discharged dredged and fill material[1] into wetlands at three sites in Carver, Massachusetts, without a permit issued pursuant to § 404 of the CWA, 33 U.S.C. § 1344, in violation of § 301(a) of the CWA, 33 U.S.C. § 1311. In February 2004, following extended discovery, the government filed a motion for summary judgment on liability. In May 2004, the district court granted the government's motion, expressly adopting as the bases for its ruling "the arguments set forth in the United States' Memorandum in Support of Its Motion for Summary Judgment on Liability."

In November 2004, the government filed a motion for summary judgment on remedy. On January 15, 2005, the district court issued a final order granting the government's motion and ordering the requested relief. On January 27, 2005, the Johnsons filed a motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure. In February 2005, the district court issued an order denying the Johnsons' motion, stating that:

> there is a sufficient basis for the United States to exercise jurisdiction because the undisputed evidence shows that the three wetlands are hydrologically connected to the navigable Weweantic River by nonnavigable tributaries.

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[1] Dredged and fill material include dirt, spoil, rock, and sand.

This appeal followed.[2]

The untimeliness of Defendants' letter was caused by the withdrawal of Defendants' counsel on the day the response to the government's summary judgment motion was due, which forced Defendants to proceed pro se and file a tardy response. The district court never ruled on the timeliness issue. Instead, the district court delayed its ruling regarding liability until after Defendants had submitted their responsive letter. The government never raised a timeliness objection below. Given the circumstances, excuse of the tardiness of Defendants' letter is warranted.

The letter is a four-page, single-spaced document with numerous statements questioning the government's jurisdiction over the property at issue. Defendants properly raised their statutory and regulatory arguments in the letter. As for Defendants' Commerce Clause argument, we have held that "[a]lthough Appellant failed to raise his *Lopez*-based challenge below, a claim that a statute is unconstitutional or that the court lacked jurisdiction may be raised for the first time on appeal." *United States v. DiSanto*, 86 F.3d 1238, 1244 (1st Cir. 1996) (referencing *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)). Based on *DiSanto*, Defendants may raise their constitutional challenge on appeal. The government asserts, incorrectly, that *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997)—where we held that the defendant's constitutional challenges to his conviction were

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[2] The government asserts that Defendants have waived the arguments they now raise on appeal. Specifically, the government argues that in response to its motion for summary judgment on liability, the Johnsons filed only an untimely pro se letter. Then, in response to its motion for summary judgment on remedy, the Johnsons did not file any response—only later filing their Rule 59(e) motion for reconsideration. There is no merit in the government's waiver argument.

subject to the raise-or-waive rule—forecloses this possibility. However, in *Bongiorno*, the constitutional challenges that we found procedurally defaulted were not challenges to the statute at issue in that case. Therefore, *Bongiorno* and *DiSanto* are consistent with one another, and *Bongiorno* does not preclude review of Defendants' Commerce Clause argument.

C. Factual Background

The property at issue involves three sites in Carver, Massachusetts: (1) the Cross Street site; (2) the Fosdick Street site; and (3) the Forest/Fuller Street site (collectively, the "target sites"). These sites are "hydrologically connected" to the Weweantic River, a "navigable-in-fact"[3] waterway that flows south from Carver, Massachusetts, to Wareham, Massachusetts, where it empties into Buzzards Bay and the Atlantic Ocean. "Hydrologically connected" here means that water from the three sites eventually drains into the Weweantic River. Consequently, any pollutants discharged on or from the target sites would reach the Weweantic River through this hydrological connection.

The government introduced the testimony of a number of experts in support of its Motion for Summary Judgment on Liability. These experts had reviewed topographic and other maps, aerial photographs, and EPA reports, and had performed visual inspections to reach their conclusion that the targets sites

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[3] "Navigable-in-fact" is used to describe a body of water on which navigation, i.e. boat or ship traffic, takes place or could take place. The CWA uses the term "navigable waters" to label waters over which it has jurisdiction, some of which are not navigable-in-fact. Where used in this opinion, "navigable waters" will have the meaning the CWA attributes to it: waters over which federal regulatory jurisdiction extends. As further discussed below, "waters of the United States" is synonymous with "navigable waters" in this usage.

are hydrologically connected to the Weweantic River. Defendants do not dispute this conclusion; in fact, the government's experts relied on some of the testimony and analysis of Defendants' expert in reaching their conclusion.

As will become apparent later in the discussion, the particular bodies of water that form the connection between the target sites and the Weweantic River are vital to the question of whether the exercise of CWA jurisdiction is valid. Each target site is immediately adjacent to, i.e. connected to, a stream, creek, or ditch; and every wetland, bog, or swamp in the chain of waters connecting the target sites to the Weweantic River is also immediately adjacent to a stream, creek, ditch, or pond.

Defendants do not dispute either the factual descriptions of the target sites or the waters that link the target sites to the Weweantic River. Defendants' arguments on appeal are purely legal.

1. The Weweantic River

The Weweantic River is formed by the merging of two brooks: the Rocky Meadow Brook and the South Meadow Brook. Water from the target sites—after it travels through a number of intermediary waters—makes its way into these brooks a short distance before the two brooks join and form the Weweantic. Prior to the Johnsons' actions on the target sites, water from the target sites had surface water (as distinguished from ground water[4]) hydrological connections to the Weweantic River via the Rocky Meadow or South Meadow Brooks.

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[4] Ground water is defined as water beneath the earth's surface, often between saturated rock and soil. *See, e.g.*, 10 C.F.R. § 63.302 ("Ground water means water that is below the land surface and in a saturated zone."). This is the type of water that typically supplies wells and springs. By contrast, surface water is water found on the soil's surface, i.e. all water that is not ground water. Wetlands are a type of surface water.

The CWA does not cover any type of ground water; the CWA covers only surface water. Nothing in the terms of the CWA or the regulation at issue here interpreting the CWA could be construed as extending jurisdiction to a body of ground water. Federal regulation of ground water is covered in other statutes. *See, e.g.*, 42 U.S.C. §§ 300h, 6949a(c), 9621(d)(2)(B)(ii). Two Seventh Circuit cases explain in greater detail why ground water is a limiting principle for the CWA. *See United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

2. The Cross Street site

Prior to the Johnsons' activities, the Cross Street site contained an area of forested wetlands in the north and an area of grassy marsh and scrub-shrub wetlands in the south. The northern wetlands drained into an unnamed stream/ditch that flowed across the site and into Beaver Dam Brook. The southern wetlands were adjacent to Beaver Dam Brook and were part of a larger wetland area that stretches to South Meadow Brook. The southern wetlands drained into either Beaver Dam Brook or to South Meadow Brook. Beaver Dam Brook joins South Meadow Brook just south of the Cross Street site. Therefore, in summary, water from the Cross Street site drains into an unnamed stream/ditch, which in turn drains into another stream/ditch (Beaver Dam Brook and/or South Meadow Brook), which in turn flows into the navigable-in-fact Weweantic River.

3. The Fosdick Street site

The Fosdick Street site lies north of the Cross Street site. Prior to the Johnsons' activities, the site contained a shallow reservoir formed by the historic impoundment of the confluence of two unnamed streams, one perennial, the other intermittent. The site also contained forested wetlands along the two streams, and scrub-shrub wetlands near the reservoir. All of these

wetlands drained into an unnamed perennial stream that flowed through cranberry bogs south of the reservoir and then into a pond. The pond drains through a channel to Rocky Meadow Brook, and then into the Weweantic River. Therefore, in summary, water from the Fosdick Street site flows from the wetlands into a stream, into another wetland, then into a pond, into a channel, into another stream (Rocky Meadow Brook), and finally into the navigable-in-fact Weweantic River.

4. The Forest/Fuller Street site

The Forest/Fuller Street site lies north of the Fosdick Street site. Prior to the Johnsons' activities, the site contained forested, shrub, and shrub/emergent wetlands, all surrounding an existing cranberry bog ("Bog A"). Bog A and the surrounding wetlands drain into an unnamed stream, which in turn flows into the Log Swamp Reservoir. From there, water moves through another bog system into a stream that travels through a wetland and into a pond. Water then flows from the pond through another bog system, and then into the Rocky Meadow Brook, which flows into the Weweantic. Therefore, in summary, water flows from the Forest/Fuller site through a stream, a reservoir, a bog, another stream, a wetland, a pond, another bog, a third stream (Rocky Meadow Brook), and then finally into the navigable-in-fact Weweantic River.

5. The Johnsons activities

At various times between 1979 and 1999, the Johnsons and their agents discharged dredged and fill material at all three of the target sites in order to construct, expand, and maintain cranberry bogs. The Johnsons did not obtain permits from the Corps for these discharges pursuant to 33 U.S.C. § 1344. Defendants do not dispute their activities on the target sites, nor their failure to obtain a permit from the Corps for those activities.

6. The concurrence's reading of the record

The concurrence has a differing view of the hydrological connections between the target sites and the Weweantic River. The concurrence contends that "[n]o factual basis is presented by the EPA for the conclusion that either connecting system [of waters] depends upon wetlands other than the target sites . . . ." Therefore, in the concurrence's view, it is unnecessary to address the jurisdictional question raised by wetlands that form part of the hydrological connection between the target sites and the Weweantic River. Respectfully, both this opinion and the dissent disagree with this interpretation of the record.

The concurrence relies primarily on the EPA's description in its briefs on appeal of the hydrological connection between the target sites and the Weweantic River, and supplements the EPA's description with some quotations taken from the EPA's expert, Mr. Scott Horsley. The concurrence emphasizes the EPA's use of the phrase "flow through" to describe the movement of a stream through wetlands. In the view of the concurrence, this language means that the stream never loses its identity as a stream as it moves through wetlands. I do not believe that the record supports this interpretation.

Mr. Horsley describes the hydrological connection of the Forest/Fuller Street site as follows:

> The 1941 and 1949 maps show a hydrological connection from Bog A, with a channel which emptied into a finger-shaped swamp that jutted north from the Low Swamp Reservoir. The 1977 map shows a stream connecting the area of Bog A to the Log Swamp Reservoir. The 1977 USGS map shows that from the Log Swamp Reservoir, water flows south through another bog system, into a stream that travels through a wetland and into a pond. Water from this pond drains into another bog system, and becomes Rocky Meadow Brook.

This language describes a chain of waters that includes wetlands as well as streams and ponds. There is a "channel which emptied into a finger-shaped swamp". The channel does not cross or span the swamp. It empties into the swamp. "[F]rom the Log Swamp Reservoir, water flows south through another bog system, into a stream that travels through a wetland and into a pond." Water, not the "stream or channel", flows through another bog system and then into a stream. The stream is interrupted. The "stream [ ] travels through a wetland and into a pond. Water from this pond drains into another bog system, and becomes Rocky Meadow Brook." Again, the stream is interrupted by a pond, and the water enters another bog system before becoming Rocky Meadow Brook.

Although Mr. Horsley sometimes uses the phrase "flow through" to describe a stream traveling through a wetland, he also uses the phrase to describe water flowing through a bog system. Because Mr. Horsley attributes a variable meaning to the phrase "flow through", that phrase, when used by the EPA, does not have the singular meaning that the water at issue is always flowing as an identifiable stream. Sometimes it does flow in that fashion; sometimes it loses that identity and becomes diffuse water that drains through a wetland.

Mr. Horsley uses the "flow through" language to describe the hydrological connection for the Fosdick Street site as well. But because of the variable meaning attributed to "flow through", his use of the phrase does not permit the conclusion that the Fosdick Street site must have a hydrological connection that consists only of streams, creeks, and brooks—i.e. non-wetland waters—flowing through wetlands without losing their identity. The concurrence contends that a continuous blue line found on some of the maps "suggest[s] that the hydrological connections are through streams and brooks rather than diffused through wetlands." However, on some of the maps in the record, the thin blue line is actually identified as "drainage" and not a stream. According to Mr. Horsley's

testimony, there is not an unbroken tributary connecting the Forest/Fuller Street site to the Weweantic River. Therefore, the blue line does not necessarily mean that the hydrological connections of the target sites are only through streams and brooks as the concurrence suggests.

Additionally, the concurrence contends that the EPA did not present to the district court the question raised by wetlands that form part of the hydrological connection between the target sites and the Weweantic River; and that the district court, by relying exclusively on the EPA's memorandum and evidence, did not address this question. However, as we have demonstrated by a close examination of the testimony of Mr. Horsley, the hydrological connection advanced by the EPA in the district court included these additional wetlands. Therefore, the jurisdictional issue raised by these additional wetlands was necessarily before the district court.

D. Statutory and Regulatory Background

The government asserts jurisdiction over Defendants' actions on the target sites pursuant to the Clean Water Act.[5] Under § 301 and § 502 of the CWA, 33 U.S.C. § 1311 and § 1362, any discharge of dredged or fill material into "navigable waters"—defined in the Act as "waters of the United States"[6] —is forbidden unless authorized by a permit issued by the Corps pursuant to § 404 of the CWA, codified at 33 U.S.C.

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[5] The relevant portions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816.

[6] 33 U.S.C. § 1362(7) states that under the CWA, "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."

§ 1344.[7] The EPA and the Corps are empowered by the CWA to develop regulations to implement the mandates of the CWA.[8]

The two relevant Supreme Court decisions, *United States v. Riverside Bayview Homes*, *infra*., and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, *infra*., involved disputes arising from the Corps's enforcement of the CWA. Hence, these two decisions used the Corps' regulation in their analysis. That fact in no way diminishes the applicability of those cases to this case.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Court found that:

> [a]fter initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining "the Waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters

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[7] 33 U.S.C. § 1344(a)—entitled "Discharge into navigable waters at specified disposal sites"—states in relevant part that: "The Secretary [of the Army, acting through the Chief of Engineers] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

[8] The Corps regulation and the EPA regulation applicable to the Johnsons' property are identical. *See* 40 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s). The Corps and the EPA are jointly charged with enforcing the CWA. *See* 33 U.S.C. § 1344(s) and 33 U.S.C. §§ 1319(a)(3) & (b). Here, because the EPA brings this civil enforcement action against the Johnsons, not the Corps, the EPA's regulation is used for the analysis.

> and their tributaries, and nonnavigable intrastate waters . . . .

Id. at 123-24, 106 S. Ct. 455. The regulation at issue here has not significantly changed from the regulation issued in 1975. This regulation, found at 40 C.F.R. § 230.3(EPA),[9] states in relevant part:

> For the purposes of this regulation these terms are defined as follows:
>
> (b) The term "adjacent" means bordering, contiguous, or neighboring. . . .
>
> . . .
>
> (s) The term "waters of the United States" means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

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[9] The Corp's version of this regulation is 33 C.F.R. § 328.3.

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (s)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)-(6) of this section.

Sections (s)(1)-(s)(4) and (s)(6) are best understood as simultaneously stating the type of water over which the CWA has jurisdiction and providing the interstate or foreign rationale under the Commerce Clause for that jurisdiction. Sections (s)(1)-(s)(4) and (s)(6) each have what will be termed an "independent" rationale for jurisdiction. Sections (s)(5) and (s)(7), however, have what will be labeled a "derivative" rationale, meaning that there is no independent rationale justifying jurisdiction over waters described in (s)(5) and (s)(7). Jurisdiction over waters covered by (s)(5) and (s)(7) is valid only if the jurisdictional rationale for the water on which it is "piggybacking" is also valid. The government asserts jurisdiction here over the target sites via (s)(5), which extends jurisdiction over "tributaries", and (s)(7), which extends jurisdiction over "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section."

For example, (s)(1) covers waters used in the past and present, and that could potentially be used, "in interstate or foreign commerce". Subsection (s)(1) establishes jurisdiction over navigable-in-fact waters and justifies jurisdiction with

explicit reference to "interstate or foreign commerce", i.e. (s)(1) covers waters used as "channels of commerce". *See United States v. Lopez*, 514 U.S. 549, 558, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 563, 19 L. Ed. 999 (1870) (stating that "[waters] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"). In the scheme established by § 230.3, the government's jurisdiction over waters described in (s)(5) (tributaries) and (s)(7) (wetlands adjacent) would derive from the government's jurisdiction over waters covered by (s)(1) (navigable-in-fact). In fact, this is precisely the rationale the government asserts here.

Certain terms in the text of § 230.3 emphasize this distinction between independent and derivative rationales. For instance, the word "tributary" as used in the regulation and navigability-in-fact are mutually exclusive. If § 230.3(s)(1) extends jurisdiction over navigable-in-fact waters, "tributaries" of such waters, discussed in (s)(5), cannot be navigable-in-fact. If a tributary were navigable-in-fact, jurisdiction over that particular water would be covered by (s)(1). Although in common usage a tributary could be navigable-in-fact—e.g. the Missouri River is a tributary of the Mississippi River—navigability-in-fact and "tributary" are not redundant bases for jurisdiction under the regulation.

In the same way that (s)(5) would be repetitive if "tributaries" were navigable-in-fact, (s)(7) is redundant unless "wetlands adjacent" are not "tributaries" as described in (s)(5) or navigable-in-fact waters as described in (s)(1). For example, if an (s)(7) "wetland adjacent" were navigable-in-fact, jurisdiction over that wetland would actually be covered by (s)(1). Section (s)(7) would be unnecessary. Similarly, if an (s)(7) wetland were a "tributary" as covered by (s)(5), again, (s)(7) would be extraneous. Only if an (s)(7) "wetland

adjacent" is categorically different from a navigable-in-fact water or an (s)(5) tributary does the inclusion of (s)(7) make sense.[10]

E. Supreme Court Precedents

In addition to assessing the statutory and regulatory background, two Supreme Court decisions regarding the jurisdictional reach of the CWA must be considered: *Riverside* and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) [hereinafter *SWANCC*]. Each party asserts that a Supreme Court precedent squarely disposes of this appeal. The government contends that *Riverside* resolves the matter of regulatory jurisdiction in its favor; Defendants assert that *SWANCC* resolves the jurisdictional question in their favor. These contentions are unpersuasive. Although each decision

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[10] The district court states in its order denying Defendants' Motion for Reconsideration that "the three wetlands are hydrologically connected to the navigable Weweantic River by *nonnavigable tributaries*." (Emphasis added.) The concurrence takes the district court to mean that only tributaries, and no wetlands, comprise the hydrological connections of the target sites to the Weweantic River. The concurrence bases this interpretation of the district court's statement on its assumption—a correct one—that the district court based its decision entirely on the EPA's position. But the concurrence, as already noted, incorrectly attributes to the EPA the position that no wetlands are part of the hydrological connections at issue here. The EPA's expert explained that there are wetlands involved in the hydrological connection. That is the EPA's position. Whatever the district court's language in the single dispositive sentence on the Motion for Reconsideration, it must necessarily have incorporated the presence of these additional wetlands into its conclusion.

provides important guidance for resolution of this appeal, neither decision directly disposes of the questions concerning regulatory jurisdiction over the target sites.

1. *Riverside*

The Court's holding in *Riverside* begins with the recognition of a deference question. Citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the Court stated that:

> our review is limited to the question whether it is reasonable in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to . . . rivers, streams, and other hydrographic features more conventionally identifiable as "waters."

Riverside, 474 U.S. at 131, 106 S. Ct. 455. The Court acknowledged that while the CWA used the term "navigable" to denote the reach of regulatory jurisdiction, its definition of "navigable waters" as "waters of the United States" extended jurisdiction over some waters that were not navigable-in-fact. *Id.* at 133, 106 S. Ct. 455. Hence, "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* The Court concluded that:

> a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.

Id. at 135, 106 S. Ct. 455.

Relying on expansive language such as this, the government asserts that *Riverside* answers the question of whether jurisdiction over the target sites is valid. However, the government has uncoupled *Riverside*'s holding from its facts. The property at issue in *Riverside* was "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan," *id.* at 124, 106 S. Ct. 455—a wetland adjacent to a navigable-in-fact water. Because the site at issue in *Riverside* was a wetland "that actually abuts on a navigable waterway," *id.* at 135, 106 S. Ct. 455, the Court never addressed the term "tributaries" as used in § 230.3(s)(5).

In the parlance used in the previous section, *Riverside* approves the independent rationale for jurisdiction provided in § 230.3(s)(1)—for navigable-in-fact waters. The *Riverside* court also approved jurisdiction over adjacent tributaries and wetlands, via (s)(5) (tributaries) and (s)(7) (wetlands adjacent), and the derivative rationale necessary to justify that extension of jurisdiction. Specifically, the Court approved an (s)(7) (wetlands adjacent) derivative rationale based on the independent rationale of (s)(1) (navigable-in-fact). By implication, this means that jurisdiction over an (s)(5) tributary adjacent to an (s)(1) water would also be valid. However, *Riverside* does not address the meaning or scope of the term "tributaries" as used in (s)(5), which is critical to this appeal.

2. *SWANCC*

The property at issue in *SWANCC* was "an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds." 531 U.S. at 162, 121 S. Ct. 675. The Court described the property as "nonnavigable[-in-fact], isolated, intrastate waters" and "ponds that are *not* adjacent to open water". *Id.* at 166, 168, 121 S. Ct. 675 (original emphasis). The property at issue was not a navigable-in-fact water under (s)(1), a tributary of a navigable-in-fact water under (s)(5), or a wetland adjacent to either of these two categories of water under (s)(7).

The Corps had exerted federal jurisdiction over the ponds in *SWANCC* pursuant to subpart (b) of the "Migratory Bird Rule" (or the "Rule"), which the Corps issued to clarify the reach of its jurisdiction under § 404(a) of the CWA.[11] The Migratory Bird Rule is the Corps' interpretation[12] of 33 C.F.R.

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[11] The Migratory Bird Rule states that § 404(a) jurisdiction extends to intrastate waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

Migratory Bird Rule, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986); *see also SWANCC*, 531 U.S. at 164, 121 S. Ct. 675.

[12] "The Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553." *SWANCC*, 531 U.S. at 164, 121 S. Ct. 675 n.1. As such, the Rule is best understood as an agency interpretation of an agency regulation, rather than an agency regulation. This fact becomes important when issues of deference to administrative agencies arise.

§ 328.3(a)(3)(1999).[13] Section 328.3(a)(3) states that jurisdiction of the CWA extends to:

> waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

The Court held that "33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,'. . . exceeds the authority granted to [the Corps] under § 404(a) of the CWA." *SWANCC*, 531 U.S. at 174, 121 S. Ct. 675. As a result, any extensions of jurisdiction over waters that rely on the Migratory Bird Rule, including (s)(3) (intrastate) waters and (s)(5) (tributaries) and (s)(7) (wetlands adjacent) waters through a rationale derived via (s)(3), are invalid.

Defendants insist that *SWANCC* sharply curtails the reach of *Riverside*, which should be understood as creating an exception to the general rule that CWA jurisdiction extends only to navigable-in-fact waters: "[t]he *Riverside Bayview* exception to the 'navigable waters' requirement only extends to nonnavigable waters that 'actually abut [ ] on a navigable waterway.'" Although they correctly characterize what *Riverside* directly addressed, Defendants misinterpret *Riverside* by conflating what *Riverside* held about CWA jurisdiction with the entirety of CWA jurisdiction. Put another way, Defendants incorrectly assert that *Riverside* constitutes the outer reach of the CWA.

Defendants base this misinterpretation of *Riverside*'s holding on a misapprehension of the phrase "open water", a

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[13] The parallel EPA regulation is 40 C.F.R. § 230.3(s)(3).

phrase the Court used in both *Riverside* and *SWANCC*. In a footnote discussing what it was not addressing, the *Riverside* court stated:

> we are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of *open water*, *see* 33 C.F.R. §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.

474 U.S. at 131, 106 S. Ct. 455 n.8 (emphasis added).[14]

Section 323.2(a)(2) (1985) includes "[a]ll interstate waters including interstate wetlands." Section 323.2(a)(3) includes:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

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[14] In *Riverside*, the Court addressed 33 C.F.R. § 323.2(a) (1985). Here, 40 C.F.R. § 230.3(s) (EPA) and 33 C.F.R. § 328.3(a) (Corps), which superceded § 323.2(a), are addressed. The language of the two regulations is virtually identical, as is the regulatory scheme established by the two regulations. Therefore, the change in regulation has no effect on the reach of *Riverside*.

When the Court revisited *Riverside* in *SWANCC*, it stated that:

> our holding [in *Riverside*] was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of *open water* . . . ."

SWANCC, 531 U.S. at 167, 121 S. Ct. 675 (quoting *Riverside*, 474 U.S. at 131, 106 S. Ct. 455 n.8) (internal citations omitted) (emphasis added). Relying on this language from the two cases, Defendants have equated "open water" with navigability-in-fact. Based on this interpretation, Defendants assert in their brief that "as explained in *SWANCC*, Clean Water Act jurisdiction is limited to navigable[-in-fact] waters and those wetlands that abut and are 'inseparably bound up' with navigable[-in-fact] waters," i.e. jurisdiction under the CWA is limited only to (s)(1) (navigable-in-fact) waters and (s)(7) adjacent wetlands using (s)(1) for its derivative rationale.

However, Defendants overlook crucial language from *Riverside*. There, the Court states that "between *open waters* and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." 474 U.S. at 132, 106 S. Ct. 455 (emphasis added). It is clear from this language that the *Riverside* court uses "open water"

descriptively to distinguish rivers, lakes, streams, and similar bodies of water from those intermediate forms of partially wet, partially dry areas, i.e. wetlands, and from dry land. In short, "open water" means "wholly aquatic". It has nothing to do with navigability-in-fact.[15]

SWANCC does not establish *Riverside* as the limit of CWA jurisdiction over "waters of the United States". *SWANCC*'s discussion of *Riverside* is aimed at distinguishing *Riverside* from *SWANCC*. At one point, the Court emphatically states that "[i]n order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." *SWANCC*, 531 U.S. at 168, 121 S. Ct. 675 (original emphasis). At other points, the Court uses the word "isolated" when referring to the ponds at issue. *See, e.g., id.* at 171, 121 S. Ct. 675. *SWANCC*'s meaning in relation to *Riverside* is clear: jurisdiction over waters that are not "inseparably bound up with" navigable-in-fact waters, e.g. the ponds at issue in *SWANCC*, cannot find support in *Riverside*. This is the extent to which *SWANCC*'s holding constrains

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[15] This concept of "open water" must be consistent with the understanding of how § 230.3 operates, i.e. the distinction between independent and derivative rationales. For them to be consistent, § 230.3 should incorporate the Court's concept of "open water". The regulation would demonstrate this consistency by distinguishing between types of open water, e.g. streams and creeks, that are and are not navigable-in-fact—which it does. While all navigable-in-fact waters are covered by (s)(1), § 230.3 contains sections that recognize non-navigable-in-fact "open water": (s)(3) ("rivers, streams (including intermittent streams)") and (s)(5) (not navigable-in-fact "tributaries"). The "open water" described in (s)(3) (intrastate waters) and (s)(5) (tributaries) is by definition not navigable-in-fact, based on the same redundancy reasoning used when the regulation was first introduced.

Riverside's.[16] Put another way, *SWANCC* itself is best understood as establishing the outer boundary of CWA jurisdiction. But it does not directly address the type of waters at issue here.

Nevertheless, the language that *SWANCC* uses to describe this outer boundary of CWA jurisdiction over a particular water is important. As noted above, the Court stated:

> We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*.

SWANCC, 531 U.S. at 167, 121 S. Ct. 675 (citing *Riverside*, 474 U.S. at 131, 106 S. Ct. 455 n.8.) (internal citations omitted). In order for the extension of CWA jurisdiction over wetlands, such as the target sites, to be valid, those wetlands must be "inseparably bound up with the waters of the United States," i.e. there must be a "significant nexus" between the target sites and a navigable-in-fact water. On the basis of *Riverside* and *SWANCC*, this opinion has rejected Defendants' assertion that these phrases—"inseparably bound up with" or "significant nexus"—require adjacency to a navigable-in-fact water. The target sites do not have that adjacency. Instead, they have a hydrological connection to a navigable-in-fact

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[16] In this respect, this opinion respectfully disagrees with the Fifth Circuit's decisions in *In re Needham*, 354 F.3d 340 (5th Cir. 2003), and *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). These decisions interpret *SWANCC* in substantially the same manner as Defendants do, holding that *SWANCC* understands *Riverside* to constitute a mere exception that narrowly extends CWA jurisdiction to wetlands adjacent to navigable-in-fact waters.

water. This opinion must now evaluate the government's jurisdictional assertion that this hydrological connection qualifies as a "significant nexus" within the meaning of *Riverside* and *SWANCC*.

II.

A. The *Deaton* decision and methodology

Navigation between *Riverside* and *SWANCC* requires an independent inquiry into the validity of regulatory jurisdiction over the target sites. The Fourth Circuit's decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), provides helpful methodological and substantive guidance.[17] There, the property at issue was a wetland with a similar connection to a navigable-in-fact water;[18] also, the parties likewise had little or

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[17] Other circuits have gone so far as to adopt the reasoning of *Deaton* almost wholesale when confronted with similar factual circumstances. *See, e.g., Gerke Excavating, Inc.*, 412 F.3d at 804; *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003). As we explain above, Defendants present a statutory- and regulatory-based argument and a constitutional argument in favor of overturning the district court's decision. The *Deaton* court's methodology, which we follow here, was to answer the constitutional question first.

[18] The *Deaton* court described the site as follows: "The parcel slopes gently downhill toward a country road, Morris Leonard Road. A drainage ditch runs alongside the road between the pavement and the Deatons' property .... The parties agree that surface water from the Deatons' property drains into the roadside ditch .... At the northwest edge of the Deaton's property, the roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable." *Deaton*, 332 F.3d at 702.

no dispute over the presence of a hydrological connection. *See id.* at 702.

As in *Deaton*, Defendants here argue that this court should not defer to the EPA's regulation or its administrative interpretation of it because § 230.3(s), as applied to the target sites, pushes the limits of congressional authority under the Commerce Clause and thereby raises serious constitutional questions. Thus, Defendants assert that § 230.3(s), as interpreted and applied to the target sites, cannot survive the threshold requirement described in *SWANCC*: "where an administrative interpretation of a statute invokes the outer limits of Congress' power," the interpretation is not entitled to deference under *Chevron* unless Congress gave "a clear indication that [it] intended that result." *SWANCC*, 531 U.S. at 172, 121 S. Ct. 675. According to Defendants, Congress never clearly stated its intention to use the CWA for the broad assertion of Commerce Clause authority at issue here and thereby reach wetlands so far removed from navigable-in-fact waters.

The "clear statement" rule that Defendants assert is a corollary to the doctrine of constitutional avoidance. This doctrine reflects a "prudential desire not to needlessly reach constitutional issues and [an] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73, 121 S. Ct. 675. In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), the Court held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at 575, 108 S. Ct. 1392.

However, the *Deaton* court concluded that this clear statement principle of constitutional avoidance set forth in

SWANCC and *DeBartolo* had to be understood in light of the Court's holding in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). *See Deaton*, 332 F.3d at 705. In *Rust*, the Supreme Court decided the constitutionality of Department of Health and Human Services regulations promulgated in the wake of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), relating to the ability of federal fund recipients to engage in abortion-related activities. Confronting statutory and constitutional challenges to the regulations similar to the challenges in this case, the Court refused to circumscribe or invalidate the regulations to avoid ruling on the constitutionality of the underlying statute. The Court offered this rationale for its rejection of constitutional avoidance:

> [t]he extensive litigation regarding governmental restrictions on abortion since our decision in *Roe v. Wade* . . . suggests that it was likely that any set of regulations promulgated by the Secretary—other than the ones in force prior to 1988 and found by him to be relatively toothless and ineffectual—would be challenged on constitutional grounds. While we do not think that the constitutional arguments made by petitioners in these cases are without some force . . . we hold that they do not carry the day. Applying the canon of construction [the doctrine of constitutional avoidance] under discussion as best we can, we hold that the regulations promulgated by the Secretary do not raise the sort of "grave and doubtful constitutional questions". . . that would lead us to assume Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality.

Rust, 500 U.S. at 191, 111 S. Ct. 1759 (internal citations omitted).

Rust creates an "exception" to the command to circumscribe the scope of regulations and related interpretations that arguably implicate the constitutionality of the underlying statutes, in those situations where "it [is] likely that any set of regulations promulgated by the [agency] . . . would be challenged on constitutional grounds." 500 U.S. at 191, 111 S. Ct. 1759; *see also* Charles Alan Wright & Charles H. Koch, Jr., 33 *Federal Practice and Procedure* § 8363 (2006). *Rust* is a reminder that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." 500 U.S. at 191, 111 S. Ct. 1759 (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S. Ct. 620, 77 L. Ed. 1265 (1933)). Constitutional avoidance under the aegis of the clear statement principle is not a neutral principle that simply defers difficult decisions on the validity of regulations without consequences. Application of the clear statement principle has the effect of rejecting the scope or validity of administrative regulations and interpretations in favor of circumscribed versions that seem to avoid constitutional challenges to the underlying statute. Without *Rust*, the unyielding application of the constitutional avoidance doctrine "would apparently make every rule invalid merely upon any constitutional challenge and, in fact, would prevent the resolution of many constitutional questions raised by a regulatory regime." Wright and Koch, 33 *Federal Practice and Procedure* § 8363.

For almost thirty years, the assertion of jurisdiction by the EPA and the Corps has gone beyond navigable-in-fact waters. Over that time, most challenges to the extension of CWA jurisdiction have raised constitutional questions, *see, e.g.*, *Riverside*, 474 U.S. at 123, 106 S. Ct. 455, because the statute speaks of "navigable waters", making navigable-in-fact waters the only "safe" extension of jurisdiction, constitutionally speaking. However, to apply the doctrine of constitutional avoidance here in favor of the safe "navigation-in-fact" reading of the statute would ignore the CWA's text, which asserts

jurisdiction beyond navigable-in-fact waters by defining "navigable waters" as "waters of the United States".

Rust allows us to assess the merits of the constitutional arguments against the government's interpretation and application of § 230.3(s) instead of invalidating the agency's action because of a reflexive adherence to the doctrine of constitutional avoidance. *See Deaton*, 332 F.3d at 705. If this opinion concludes that these arguments do not "raise the sort of grave and doubtful constitutional questions that . . . would lead us to assume Congress did not intend to authorize [the regulation's] issuance," *Rust*, 500 U.S. at 191, 111 S. Ct. 1759 (internal citations omitted), it may, as the *Deaton* court concluded, "proceed to the *Chevron* analysis." *Deaton*, 332 F.3d at 705. That is, with the specter of statutory unconstitutionality removed, familiar issues of deference to administrative regulations may then be addressed.

Therefore, the constitutional challenge posed by Defendants will be addressed first before proceeding to evaluate their claim that there is an inconsistency between the CWA and the regulation promulgated to give effect to the CWA and/or the EPA's interpretation and application of that regulation. Specifically, the remaining question is whether the Commerce Clause gives Congress the authority to enact legislation—the CWA—that extends jurisdiction over the tributaries and wetlands implicated by the EPA's extension of regulatory jurisdiction over the target sites.

B. The constitutional question

Supreme Court jurisprudence has identified three broad categories of activity that Congress may properly regulate pursuant to the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or

> things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59, 115 S. Ct. 1624 (internal citations omitted). Congress may regulate activities under the third category only if those activities are "economic in nature". *United States v. Morrison*, 529 U.S. 598, 613, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).

The purpose of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Optimistically, it included the "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). The EPA invokes this explicit statutory purpose and goal to support its assertion of jurisdiction over the wetlands involved in this case. In assessing the constitutional implications of this assertion (whether it raises grave and vexing constitutional questions), the Commerce Clause rationale for the CWA itself must be addressed. This will be done in two parts. First, the Fourth Circuit's persuasive approach to this question in *Deaton* will be summarized; second, the consistency of the *Deaton* court's approach with the Supreme Court's decisions in *Riverside* and *SWANCC* will be tested.

1. The *Deaton* court's Commerce Clause analysis

The *Deaton* court begins with two indisputable propositions: (1) Congress enacted the Clean Water Act under "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," 332 F.3d at 706 (quoting *SWANCC*, 531 U.S. at 172, 121 S. Ct. 675); and (2) "[t]he power over navigable waters is an aspect of the authority to regulate channels of interstate commerce,"

Deaton, 332 F.3d at 706 (quoting *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000)). "Unlike its power to regulate activities with a substantial relation to interstate commerce, Congress's power over the channels of interstate commerce reaches beyond the regulation of activities that are purely economic in nature." *Deaton*, 332 F.3d at 706. Indeed, "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained . . . ." *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 37 S. Ct. 192, 61 L. Ed. 442 (1917)). *Caminetti* held that "barr[ing] the transport of any woman or girl in interstate channels for an immoral purpose was within congressional authority, even though the defendant's conduct—transporting a woman across state lines to be and become his mistress and concubine—was entirely noncommercial." *Deaton*, 332 F.3d at 706 (internal quotation marks and citations omitted). The *Deaton* court continued: "there is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways, which may be regulated to prevent their 'immoral and injurious use[ ].'" *Id.* at 707 (quoting *Caminetti*, 242 U.S. at 491, 37 S. Ct. 192). Such injurious uses would include the release of pollutants and fill material into non-navigable-in-fact waters. As the *Deaton* court points out, "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." 332 F.3d at 707.

The *Deaton* court concluded that "Congress's authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes." *Id.* Faced with this reality, "Congress . . . may decide that the aggregate effect of all of the individual instances of discharge . . . justifies regulating each of them." *Id.* at 707 (citing *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942)). The *Deaton* court then adds these crucial points: "if Congress itself has the

authority to make that decision, it may delegate it to the Corps, as long as it provides an 'intelligible principle' to guide the agency's decisionmaking." 332 F.3d at 707. In fact, "the Corps has pursued this goal by regulating non-navigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters." *Id.* Thus, this assertion of jurisdiction by the Corps "does not invoke the outer limits of Congress's power or alter the federal-state framework." *Id.* at 708.

2. Testing the *Deaton* approach pursuant to the *Riverside/SWANCC* Commerce Clause analysis

The *Riverside* court assumed that the CWA was an appropriate exercise of Congress' commerce power because the Court reached the statutory question, validated regulatory jurisdiction over some waters that were not navigable-in-fact, and did not even mention the possibility that Congress had exceeded its power under the Commerce Clause. The *SWANCC* court, on the other hand, explicitly acknowledged the "channels of commerce" rationale for the CWA. It stated that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172, 106 S. Ct. 455. As in *Riverside*, the Court does not question the CWA's constitutional validity insofar as the exercise of congressional authority springs from Congress' "traditional jurisdiction" over navigable-in-fact waters, i.e. a "channels of commerce" rationale.

However, Congress did not enact the CWA simply to safeguard the navigability of the Nation's waters. Boats and ships can travel on polluted waters. Instead, as noted earlier, Congress designed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's

waters." 33 U.S.C. § 1251(a). The *Riverside* court acknowledged the CWA's objective, which:

> incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained.'" H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742.

Riverside, 474 U.S. at 132, 106 S. Ct. 455. The Court's recognition of this congressional intent was critical to its approval of CWA jurisdiction in *Riverside*:

> [w]e are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to "waters of the United States.

Id. at 178, 106 S. Ct. 455.

In *SWANCC*, the Court re-affirmed its holding in *Riverside*—the finding of jurisdiction, the existence of a valid constitutional rationale justifying the assertion of jurisdiction, and Congress' purpose in creating the Clean Water Act:

> our holding [in *Riverside*] was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of

> water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States."

SWANCC, 531 U.S. at 167, 121 S. Ct. 675 (internal citation omitted) (quoting *Riverside*, 474 U.S. at 134, 106 S. Ct. 455). When the Court refers in *SWANCC* to a "significant nexus" between wetlands and "navigable waters", it is referring to wetlands that are "inseparably bound up with 'waters' of the United States." *Id.* Both *Riverside* and *SWANCC* confirm the validity under the Commerce Clause of the Clean Water Act's overriding purpose—"a concern for the protection of water quality and aquatic ecosystems." *Id.* In such ecosystems, as the *Deaton* court noted, "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." 332 F.3d at 707. In the words of the Supreme Court, such tributaries or wetlands are "inseparably bound up with waters of the United States." *Riverside*, 474 U.S. at 134, 106 S. Ct. 455 (internal quotation marks omitted).

The Court's approval in both *Riverside* and *SWANCC* of the CWA's express purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), confirms that the *Deaton* court's analysis of the CWA as an exercise of Congress' power over "channels of commerce" is consistent with those decisions. Pursuant to the Commerce Clause, Congress had the power in the CWA to prevent the injurious use of navigable waters by regulating the discharge of pollutants at their source. The CWA, and the agency regulations implementing the CWA, do not raise grave constitutional questions when justified on a "channels of commerce" rationale. The application of *Chevron* deference to the regulation does not require a clear statement from Congress that it intended to assert its full authority under

the Commerce Clause when it enacted the CWA. As the *Deaton* court stated:

> In sum, the Corps's regulatory interpretation of the term "waters of the United States" as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power .... The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation.

332 F.3d at 708.

What remains for decision in this appeal is precisely the type of question that the *SWANCC* court decided: is the regulation—and the interpretation of that regulation—promulgated by the EPA to implement the CWA a valid exercise of the authority delegated to the EPA by Congress, as it is applied by the EPA to the target sites? Thus posed, this question raises Defendants' statutory argument against the EPA's position in this case.

C. The statutory question

The thrust of Defendants' statutory objection is this: even if the EPA could regulate the target sites without raising serious constitutional questions, the regulation as interpreted by the EPA is an unreasonable interpretation of the CWA. This argument, posing questions about deference to administrative agencies, brings the discussion to *Chevron* and its two-part inquiry:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

> must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43, 104 S. Ct. 2778.

Under step one of *Chevron*, proceeding with this inquiry into Defendants' statutory- and regulatory-based objections requires us to determine whether the CWA directly resolves the question raised by extending jurisdiction over the target sites, or if the CWA is silent or ambiguous on that question. If Congress has been silent or ambiguous on the issue—thereby delegating to the EPA and the Corps the authority to give content to the phrase "waters of the United States"—the inquiry proceeds to the second step in the *Chevron* analysis—determining whether the agency's regulation extending jurisdiction to the particular waters at issue here reflects a reasonable construction of the statute.

The government, of course, asserts that regulatory jurisdiction over the target sites pursuant to § 230.3(s) represents a proper exercise of Congress' Commerce Clause power, which Congress delegated to the EPA and the Corps. Specifically, in its brief, the government asserts jurisdiction over the waters at issue in this case by relying:

> on the following three subsections of the regulatory definition of "waters of the United States": subsection (1), which refers, *inter alia*, to waters that have been or may be used in interstate commerce, including waters "subject to the ebb and flow of the

> tide" (i.e. traditional navigable waters); subsection (5), which refers, *inter alia*, to "[t]ributaries" of such traditional navigable waters; and subsection (7), which refers, *inter alia*, to "[w]etlands adjacent" to traditional navigable waters or their tributaries.

The government contends that the wetlands on the target sites are "wetlands adjacent" under § 230.3(s)(7); the open waters that comprise some of the segments connecting the target sites to the Weweantic River are all "tributaries" within the definition of § 230.3(s)(5); and the wetlands that comprise some of the segments linking the target sites to the Weweantic River are "wetlands adjacent" under § 230.3(s)(7); and the Weweantic River is covered by § 230.3(s)(1). In the parlance of this opinion, the government contends that there is an independent rationale for jurisdiction over the Weweantic River under (s)(1) (navigable-in-fact); there is a derivative rationale for jurisdiction over the open waters connecting the target sites to the Weweantic River via (s)(5) (tributaries); and there is a derivative rationale for jurisdiction over the target sites and the other wetlands in the chain of waters via (s)(7) (wetlands adjacent) via (s)(5) (tributaries) via (s)(1) (navigable-in-fact).

1. *Chevron*, step one

The exact question here is whether the CWA, by its terms, extends jurisdiction to distant, non-navigable tributaries of navigable-in-fact waters, and wetlands adjacent to those tributaries, such as the ones located on the target sites and in the chain of waters linking the target sites to the Weweantic River. As noted previously, 33 U.S.C. § 1344(a) defines "navigable waters" as "waters of the United States". Congress' definition does not limit jurisdiction to only navigable-in-fact waters.

Instead, Congress elected to move away from the traditional definition of "navigable waters" and expand the definition to "waters of the United States", which the Supreme Court in *Riverside* concluded was a strong indication that

Congress intended to regulate at least some waters that were not navigable-in-fact. *See* 474 U.S. at 133, 106 S. Ct. 455. Observing that the CWA was passed pursuant to Congress' traditional reach over navigable-in-fact waters, *SWANCC* emphasizes that the CWA extends only to those non-navigable-in-fact waters that are "inseparably bound up with the 'waters' of the United States." 531 U.S. at 167, 121 S. Ct. 675. Nevertheless, even with the guidance from these two decisions, the phrase "waters of the United States" is ambiguous enough to constitute an implied delegation of authority to the EPA to administer the Act and make rules to fill the gaps within the confines of the CWA as outlined in *SWANCC*. *See Morton v. Ruiz*, 415 U.S. 199, 231, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974) (discussing delegation of congressional authority); *see also Deaton*, 332 F.3d at 709-10.

2. Regulation ambiguity and Seminole Rock

An additional step must be inserted in the *Chevron* analysis because Defendants have challenged the meaning of the agency regulation. The EPA interprets the regulation to cover the waters connecting the target sites to the Weweantic River and the target sites themselves. Defendants assert that the agency interpretation is inconsistent with the words of the regulation. Because of this dispute, the actual meaning of the regulation must be determined before moving to the second step of *Chevron*. In such an analysis, the Supreme Court has stated the following:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of

> controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (Internal quotation marks omitted.)). This deference to an administrative agency's interpretation of its own regulations is known as *Seminole Rock* deference. If the regulation is unambiguous, *Seminole Rock* deference does not apply and the regulation's plain language controls. *See Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed.2d 621 (2000) ("The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.").

The regulation at issue, § 230.3(s), defines "waters of the United States" to include "tributaries" of navigable-in-fact waters—through a derivative rationale of (s)(5) (tributaries) waters via (s)(1) (navigable-in-fact); and "wetlands adjacent" to navigable-in-fact waters and their tributaries—through a derivative rationale of (s)(7) (wetlands adjacent) waters via (s)(1) alone, or (s)(1) and (s)(5). Defendants assert that it is incorrect to read the regulation as reaching "any nonnavigable water with any hydrologic connection to a navigable[-in-fact] water, no matter how distant or infrequent the connection and regardless of the number of intervening, nonnavigable waters." Stated another way, Defendants contend "that it is wrong to read the regulation to reach all branches of a system that eventually flow into a navigable[-in-fact] waterway." *Deaton*, 332 F.3d at 710.

There is no dispute between the parties, and there is nothing in the record to the contrary, that the Weweantic River is obviously a navigable-in-fact water, and therefore is covered by § 230.3(s)(1). Similarly, there is no factual dispute that the target sites contain wetlands that are adjacent to tributaries that hydrologically connect those wetlands to the Weweantic River via a series of tributaries and adjacent wetlands. Since the EPA asserts jurisdiction over the wetlands on the target sites pursuant to (s)(7) (wetlands adjacent), which has a derivative rationale via (s)(5) (tributaries), the focus of the interpretive dispute is whether the term "tributaries" in § 230.3(s)(5) refers only to nonnavigable waters that empty directly into a navigable-in-fact water; or does "tributaries" include the waters that the target sites are adjacent to, and the bodies of open water that form part of the chain linking the target sites to the Weweantic River. In Defendants' parlance, is the connection between the target sites and the Weweantic River too attenuated?

In *Deaton*, the Fourth Circuit found conflicting definitions of "tributary" in two relatively contemporaneous versions of Webster's dictionaries. *Deaton*, 332 F.3d at 710-11. Webster's Third New International Dictionary (1993) defines "tributary" as "(1) providing with or serving as a channel for supplies or additional matter; or (2) one that is tributary to another: as . . . a stream" (internal quotation marks omitted). By contrast, Webster's II New Riverside University Dictionary (1988) defines "tributary" as "[a] river or stream flowing into a larger river or stream." The former definition would encompass an interpretation of "tributary" as "tributary system", i.e. any body of open water with a "hydrological connection" is a tributary. Under this definition, a small, distant creek, whose water eventually made its way into the Missouri River, would be considered a "tributary" of the Mississippi River. Under the latter definition, the creek would only be considered a tributary of the Missouri River if it flowed directly into—i.e. was

adjacent to—the Missouri.[19] It must be concluded, as the *Deaton* court did, that § 230.3(s)(5) is ambiguous on the question of how far the coverage of "tributaries" extends. *See Deaton*, 332 F.3d at 711.

Turning to the agency's interpretation, the government makes repeated use of the term "tributary system" throughout its brief. For example, the government emphasizes repeatedly that Defendants "make no effort to address the significance, as a class, of the present waters—*tributary systems* of navigable-in-fact waters and their adjacent wetlands-to downstream water quality." (Emphasis added.) There is no doubt that the government interprets "tributaries" in (s)(5) to mean "tributary system". The *Deaton* court speaks to the significance of all this:

> [a]lthough the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters. Because the Corps's longstanding interpretation of the word "tributary" has support in the dictionary and elsewhere, it is not plainly erroneous. Nor is it inconsistent with the regulation. The interpretation is therefore entitled to *Seminole Rock* deference. In short, the word "tributaries" in the regulation means what the Corps says it means.

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[19] Further inquiry into other sources does not make either definition of "tributary" more plausible. The American Heritage Dictionary, (4th ed. 2000) defines tributary as "a stream that flows into a larger stream or other body of water." On the other hand, the Oxford English Dictionary, (2d ed. 1989) defines tributary as "[a] stream contributing its flow to a larger stream or lake; an affluent, feeder." This latter definition could plausibly accommodate either a "tributary system"/"any hydrological connection" or a "direct connection only" interpretation.

Deaton, 332 F.3d at 710-11. This analysis is apt. The government has reasonably interpreted "tributaries" in (s)(5) to mean any body of open water, e.g. a stream or creek, hydrologically connected to a navigable-in-fact water. This also means that a "tributary system" need not be a contiguous series of open waters, but may be interrupted by waters such as wetlands.[20]

The concurrence concludes that "the EPA did not interpret subpart (s)(5) to include other wetlands as part of the tributary systems that constitute the hydrological connections between the target sites and the [Weweantic River]. . . ." I agree with this statement. As already emphasized (in Section II.C), any additional wetlands that constitute part of the hydrological connections between the target sites and the Weweantic River are covered by subpart (s)(7).

3. *Chevron*, step two

With the ambiguity in the meaning of the regulation resolved, the second step of the *Chevron* analysis can proceed: is the regulation "based on a permissible construction" of the CWA? 467 U.S. at 843, 104 S. Ct. 2778; *see also Deaton*, 332 F.3d at 711. Defendants assert that *SWANCC* establishes *Riverside* (which approved of CWA jurisdiction over (s)(7) adjacent wetlands via a derivative rationale from an (s)(1)

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[20] Contrary to the insistence of the concurrence, the opinion does not interpret "tributary system" to include other wetlands. "Tributary" is a term the regulation uses to address only open waters, such as rivers, lakes, and streams. This is why the regulation allows for a "tributary system" to be "interrupted" by intervening wetlands. Moreover, jurisdiction over these intervening wetlands is not asserted via (s)(5) and an expansive definition of "tributary system". Instead, jurisdiction over these wetlands is asserted via (s)(7), because those wetlands, as well as the target sites, are adjacent to segments of an (s)(5) tributary system.

water) as the outer bound of CWA jurisdiction—an interpretation of *SWANCC* that this opinion has already rejected. The conclusion in step one of the *Chevron* inquiry, finding that there is ambiguity in the CWA, means that Congress intended to delegate authority to the EPA to decide how far coverage must extend to protect the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Moreover, we decided, not long after the Court's decision in *Riverside*, that "Congress intended said term [navigable waters] to be given 'the broadest constitutional interpretation.'" *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987) (citing Conference Report on Section 2770, reprinted in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 178). This appeal deals with an extension of CWA jurisdiction premised on a "channels of commerce" rationale, which the *Riverside* and *SWANCC* courts endorsed. An agency interpretation of the CWA that falls within the bounds established by these two decisions would be a reasonable and permissible one.

In *Riverside*, the Court concluded that the Corps' extension of CWA jurisdiction over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [CWA]." 474 U.S. at 135, 106 S. Ct. 455. Citing congressional findings, the *Riverside* court highlighted the reality that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132, 106 S. Ct. 455 (quoting S. Rep. No. 92-414 at 77 (1927), reprinted in 1972 U.S.C.C.A.N. 3668, 3742). *SWANCC* confirmed this holding in part because of Congress' intent "to regulate wetlands inseparably bound up with the waters of the United States" and "the significant nexus between the wetlands and 'navigable waters.'" 531 U.S. at 167, 121 S. Ct. 675 (internal citations omitted); *see also Deaton*, 332 F.3d at 712.

The government has asserted that discharges into a tributary system and wetlands adjacent to rivers, streams, and other types of open water that comprise the tributary system of a navigable-in-fact water, i.e. waters that have a hydrological connection to a navigable-in-fact water, have a substantial effect on water quality in that navigable-in-fact water. There is a "significant nexus" between a navigable-in-fact water and the tributary system that drains into it. Here, the government has provided undisputed evidence that hydrological connections exist between the target sites and the Weweantic River. Therefore, there is a significant nexus between the target sites and the Weweantic River; the target sites are inseparably bound up with the Weweantic River. Given this connection and Congress' broad delegation of authority under the CWA, the government has reasonably and permissibly interpreted the CWA to extend jurisdiction over the entire tributary system—and wetlands adjacent to that tributary system—of a navigable-in-fact water.

III.

These are the principal conclusions set forth in this opinion. Although the Supreme Court precedents invoked by the parties in support of their positions, *Riverside* and *SWANCC*, did not control the outcome of this case, they provided important guidance on the jurisdictional question at issue. Contrary to the assertion by Defendants, the doctrine of constitutional avoidance did not require invalidating the application of the EPA's regulations to the target sites. Instead, this opinion assessed the merits of their constitutional challenge to the application of the Clean Water Act to the target sites before assessing their statutory and regulatory challenges. Based on the Fourth Circuit's reasoning in *Deaton*, and the consistency of that reasoning with the Supreme Court's decisions in *Riverside* and *SWANCC*, it was concluded that the extension of jurisdiction to the target sites, justified on the basis

of a "channels of commerce" rationale, fell safely within Congress' power under the Commerce Clause.

Moving to the Johnsons' statutory- and regulatory-based arguments, this opinion applied the two-step *Chevron* inquiry. It was concluded, first, that the CWA was silent on the particular question of whether jurisdiction could be extended to the target sites and the waters connecting the target sites to the Weweantic River, which constituted a delegation of authority by Congress to the EPA and the Corps to fill that gap. Second, because the meaning of the word "tributaries" in § 230.3(s)(5) was uncertain, an additional step was necessary to resolve this definitional ambiguity before proceeding to *Chevron*'s second step. On the basis of *Seminole Rock*, the EPA's interpretation of "tributaries" as "tributary system" was entitled to deference. Finally, with the meaning of the regulation settled, the analysis could proceed to the second step of *Chevron*, concluding that the EPA's interpretation of § 230.3(s) and its application to extend jurisdiction over the target sites reflects a permissible, reasonable interpretation of the CWA.

In the end, there is a striking harmony between the legal doctrines that guide the jurisdictional analysis in this case and the physical realities that underlie the dispute. The unwavering constant that threads its way through the Clean Water Act, *Deaton*, *Riverside*, *SWANCC*, and this decision is the recognition that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States." *SWANCC*, 531 U.S. at 167, 121 S. Ct. 675 (internal quotation marks omitted). Here, the target sites are inseparably bound up with the navigable-in-fact Weweantic River because of the uncontested fact that there is a hydrological connection—through a tributary system and its adjacent wetlands—linking them together. The district court's decision that the Clean Water Act's jurisdiction extends to the target sites is affirmed.

So ordered.

DICLERICO, District Judge, concurring in part and concurring in the judgment.

I concur with the result reached by Judge Lipez in his opinion (hereinafter "the opinion"), affirming the district court's decision that Clean Water Act jurisdiction extends to the target sites involved in this case. However, I do so based on an interpretation of the record that differs from that of the opinion. Consequently, I must respectfully disagree with some of the opinion's reasoning in support of the result. I come to the same result based, in part, on different reasoning.

I interpret the record to support the conclusion that there is a hydrological connection, which constitutes a significant nexus, between each of the three target sites and the Weweantic River. Because each of the sites has a significant nexus through a hydrological connection with a navigable-in-fact water, the Commerce Clause supports CWA jurisdiction over the sites. I disagree, however, with the opinion's interpretation of the record to the extent it is based on a theory that the connection between each target site and the river depends upon diffusion of water through wetlands, other than the target sites themselves, either as part of the connecting "tributary system" or as a link or links in a series of "tributary systems."[21] I further disagree with the opinion's reasoning that the EPA's regulation, 40 C.F.R. § 230.3(s), can be reasonably interpreted to include other wetlands as part of the "tributary systems" that constitute the hydrological connections to the Weweantic River. As I view the record, the hydrological connections that are pertinent to the EPA's regulation do not include other wetlands, but instead are

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[21] There is no disagreement over the fact that the "tributary system" connecting the Cross Street site to the Weweantic River does not include other wetlands within the connecting system. There is disagreement as to the components of the systems that connect the Fosdick Street and Forest/Fuller sites to the river.

composed in each case of a system of tributaries from the target site to the river, although some of the connecting tributaries flow through other wetlands or bogs.

In my view, because the record does not support the opinion's description of the hydrological connections between the Fosdick Street and Forest/Fuller Street sites and the river, the issue of whether the regulation can reasonably be interpreted to cover that circumstance need not and should not be reached or decided in this case. That issue was not raised before or addressed by the district court. On appeal, the issue was raised only belatedly, and in a perfunctory manner, and was not addressed by the EPA.[22]

The EPA describes the connection from the Johnsons' Fosdick Street site to the Weweantic River as follows: "All of these wetlands drained into an unnamed *perennial stream that flowed through* cranberry bogs south of the reservoir and then into a pond at Maxim Corner. The pond drains through a channel to Rocky Meadow Brook, approximately one mile upstream from the start of the Weweantic River." (Citations omitted, and emphasis added.) The EPA describes the Forest/Fuller Street site connection as follows: "Bog A and the surrounding wetlands drain via an unnamed stream into the Log

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[22] Based on the opinion's interpretation of the record, whether the EPA's regulation, § 230.3(s), would extend the CWA to wetlands as described in the opinion is an important issue that had to be addressed. However, because the issue was not raised or addressed below, this court did not have the benefit of the EPA's position. In my view, the case should have been remanded to the district court for development and clarification of that issue. In particular, the EPA should have been given the opportunity, in the first instance, to address the interpretation of its own regulation in the context of the record as interpreted in the opinion. However, my colleagues did not agree to a remand.

Swamp Reservoir on the southern side of the site. The Log Swamp Reservoir drains into a *stream that flows through* a continuous series of bogs, wetlands, and ponds, before becoming the Rocky Meadow Brook." (Citations omitted, and emphasis added).

The components of the "tributary systems" that constitute the hydrological connections between the Fosdick Street and Forest/Fuller Street sites and the river are described by the EPA as streams, ponds, and brooks, with an additional channel for the Fosdick Street site. No factual basis is presented by the EPA for the conclusion that either connecting system depends upon wetlands other than the target sites, as the connections are described in the opinion, and the EPA has not presented an argument to this effect. Importantly, the district court relied on the EPA's memorandum and the EPA's evidence presented in support of its motion for summary judgment and concluded that "there is a sufficient basis for the United States to exercise jurisdiction because the undisputed evidence shows that the three wetlands are hydrologically connected to the navigable Weweantic River by nonnavigable tributaries." Based on the EPA's evidence and its theory of the case, the district court concluded that the connections from the sites to the river were through tributaries, not through other wetlands or bogs.[23]

The EPA's hydrology expert, Scott Horsley, described the connection between the Fosdick Street site and the river as "a perennial stream," which ran through bogs to the pond at Maxim Corner. Horsley's description of the connection

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[23] The opinion interprets the EPA's regulation, § 230.3(s), to define "tributary" and "wetland" as mutually exclusive waters: if a water is a tributary, it is not a wetland and vice versa. Under this interpretation, therefore, because the district court found the sites were connected to the river by tributaries, the connections necessarily do not include wetlands.

between the Forest/Fuller Street site and the river, taken by itself, might be interpreted to include "bog systems" within that connecting series. However, the map of all three sites, which Horsley prepared, depicts a continuous blue line from each site to the river, suggesting that the hydrological connections are through streams and brooks rather than diffused through wetlands. More importantly, the EPA interpreted Horsley's opinion to mean that the connection is "a stream that flows through a continuous series of bogs, wetlands, and ponds, before becoming Rocky Meadow Brook." The district court relied on the EPA's interpretation, and the Johnsons do not dispute it.

In this circumstance, where the district court adopted the EPA's interpretation of the evidence and where the Johnsons do not dispute the EPA's interpretation, that interpretation, in my opinion, must control. Because, as I view the record, the EPA does not include wetlands as part of the connecting series constituting a "tributary system," we need not resolve the difficult question of whether the EPA's regulation could properly extend its jurisdiction to a wetland site connected to a navigable-in-fact river through a system of waters that includes other wetlands.

If I had interpreted the record to show that the hydrological connections for the target sites were dependent on other wetlands, meaning other wetlands within the tributary systems as described in the opinion, I would have joined the dissent on that issue. However, in the absence of other wetlands within the connecting "tributary systems," the issue does not arise in this case. For that reason, I respectfully refrain from joining in the opinion to the extent that it describes the connections between the target sites and the river to include wetlands other than the target sites and to the extent that it holds that the EPA reasonably interpreted subpart (s)(5) to mean "tributary systems" which include other wetlands either as part of a tributary system or as links along a series of tributary systems.

Because I conclude that the EPA did not interpret subpart (s)(5) to include other wetlands as part of the tributary systems that constitute the hydrological connections between the target sites and the river, I concur that the EPA has reasonably interpreted its regulation in the context of this case, albeit based on my interpretation of the record. In all other respects, I concur with the reasoning and conclusions in the opinion.

TORRUELLA, Circuit Judge (dissenting).

The majority today holds that the term "navigable waters," as used in the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, includes any nonnavigable waters that are "hydrologically connected" to a navigable-in-fact water. This interpretation—which will vastly expand the federal government's power to regulate private landowners such as the defendants in this case—goes well beyond the intention of Congress in enacting the CWA and expands the government's powers beyond those authorized by the United States Constitution. Further, the government's assertion of jurisdiction over the Johnsons' wetlands conflicts with its own regulations. I therefore dissent.

I.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985), the Supreme Court unanimously held that the government may assert jurisdiction over wetlands adjacent to navigable-in-fact waters. Noting that Congress had defined "navigable waters" in the CWA as "waters of the United States," the Court stated that "Congress chose to define the waters covered by the Act broadly" and "the term 'navigable' as used in the Act is of limited import." *Riverside Bayview*, 474 U.S. at 133, 106 S. Ct. 455. It is thus settled that wetlands actually abutting a navigable-in-fact water are "waters of the United States" over which the government may assert jurisdiction.

However, *Riverside Bayview*—which did not address wetlands adjacent to a series of nonnavigable waters that

eventually make their way into navigable-in-fact waters—must be read in light of the Supreme Court's more recent opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("*SWANCC*"). While *SWANCC*—which involved "an abandoned sand and gravel pit" that had no hydrological connection to a navigable-in-fact water, *id.* at 162, 121 S. Ct. 675—is not dispositive of the present case, the Court's discussion in *SWANCC* is important.

The *SWANCC* Court stated that its holding in *Riverside Bayview* was based in large part on "the significant nexus between the wetlands and 'navigable waters'" and the Court's finding that Congress had "indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167, 121 S. Ct. 675 (quoting *Riverside Bayview*, 474 U.S. at 134, 106 S. Ct. 455). The Court also noted that the CWA was enacted under Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172, 106 S. Ct. 455. Perhaps most importantly, the Court stated that, while the term "navigable" is of limited import, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.*

Unfortunately, the majority's decision today does just that. Under the "any hydrological connection" test, any water that is hydrologically connected to a navigable-in-fact water is by definition "inseparably bound up with" waters of the United States and thus under the government's control. This is the case regardless of how many nonnavigable waters separate the wetland from navigable-in-fact waters, or the distance between the wetland and navigable-in-fact waters. Under the majority's test, a wetland that is separated from a navigable-in-fact water by hundreds of miles would fall under the government's jurisdiction as long as it is hydrologically connected.

Further, although the majority is careful to state that "[n]othing in the terms of the CWA or the regulation at issue here interpreting the CWA could be construed as extending jurisdiction to a body of ground water," there is nothing in the "any hydrological connection" test that would theoretically prevent the EPA from asserting jurisdiction over ground water that is hydrologically connected to a navigable-in-fact water. In other words, the only reason the majority gives for its statement that the CWA does not cover ground water is that the CWA does not cover ground water. Aside from this tautology, there is nothing in the "any hydrological connection" test that would prevent the government from asserting jurisdiction over ground waters.[24] Further, given the majority's repeated emphasis on the broad purposes of the CWA, it would seem odd not to include in the government's jurisdiction ground waters hydrologically connected to navigable-in-fact waters. After all, if the reason the majority is adopting the "any hydrological connection" test is that water moves in "hydrologic cycles" such that any waters hydrologically connected to navigable-in-fact waters are by definition inseparably bound up with those navigable-in-fact waters, then why should the fact that connections occur below, as opposed to above, the ground matter?

The obvious explanation for the majority's insistence that the "any hydrological connection" test does not include ground waters is that the inclusion of ground waters would raise even more serious constitutional problems than the inclusion of surface waters does. But even assuming that the "any hydrological connection" test covers only surface waters, it still raises serious constitutional questions, and we therefore should

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[24] In fact, several federal courts have already found that the CWA does include ground water that is hydrologically connected to a navigable-in-fact water. *See Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001) (collecting cases).

construe the CWA "to avoid such problems unless such construction is plainly contrary to the intent of Congress." *SWANCC*, 531 U.S. at 173, 121 S. Ct. 675 (internal quotation marks and citation omitted); *see also In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (holding that the CWA does not "permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters").

As the majority notes, the Supreme Court has articulated three categories of activities Congress may regulate under the Commerce Clause: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). In *SWANCC*, the Court was dealing with an argument by the government that the "Migratory Bird Rule" fell "within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." 531 U.S. at 173, 121 S. Ct. 675. The Court found that such "substantial effects" justifications for the CWA raised serious constitutional issues and decided that, in the absence of a clear statement from Congress, it would construe the CWA to avoid such questions.

The majority, in order to avoid this problem, attempts to characterize the assertion of jurisdiction over the Johnsons' wetlands as a valid exercise of Congress's Commerce Clause powers over the "channels of commerce." According to the majority, since Congress may validly regulate "channels of commerce"—which would include navigable-in-fact waters—it may validly regulate the Johnsons' wetlands in order to protect the channel of commerce involved here. In making this point, the majority analogizes to Congress's power to regulate interstate highways. However, Johnsons' wetlands are not analogous to interstate highways. What would be analogous to a highway is the navigable-in-fact Weweantic River. The

Johnsons' wetlands are more akin to a dirt footpath on private property that connects to a private dirt road that connects to a small local road that connects to a state highway. I seriously doubt whether Congress could validly regulate such a dirt footpath under a "channels of commerce" rationale; in the same manner, Congress cannot regulate the Johnsons' wetlands under a "channels of commerce" rationale.

The fact is that the wetlands at issue here are not channels of commerce. What the majority is concerned about are the aggregate affects that pollution of distant wetlands may have on navigable-in-fact waters. This falls under the third category of what Congress may regulate under the Commerce Clause: activities that substantially affect interstate commerce. The Seventh Circuit appears to have recently recognized as much, even though it reached a result with which I disagree. In *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005), the defendant had filled a 5.8 acre tract containing some wetlands that were hydrologically connected to a navigable-in-fact water. The court reasoned that, although the filling of the wetlands would probably not have a measurable effect on the navigable-in-fact water, "[the sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect.]" *Id.* at 806. In sum, although the majority attempts to characterize the regulation of these wetlands as part of Congress' power to regulate channels of commerce, this type of regulation more properly falls under the substantial effects category articulated in *Lopez*. Just as in *SWANCC*, evaluating whether the activities here have a substantial effect on interstate commerce would raise serious constitutional questions. Because Congress has not provided a clear statement indicating that it intended the CWA to reach wetlands like the ones at issue here, the EPA's interpretation should not be accorded deference. *See In re Needham*, 354 F.3d at 346 n.8.

In concluding this section, I wish to emphasize that I understand Congress's broad purpose in enacting the CWA, as well as the importance of wetlands to the quality of our nation's waters. However, there are other interests that must be considered when dealing with these issues, including the livelihood of people in the Johnsons' position and the federal-state framework involved in water conservation. Congress has recognized that the States have "the primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution" and to "to plan the development and use of . . . water resources." 33 U.S.C. § 1251(b). Today's decision goes too far in recognizing the former interests at the expense of the latter. The federal government simply may not constitutionally regulate wetlands "that are neither themselves navigable nor truly adjacent to navigable waters." *In re Needham*, 354 F.3d at 345.[25]

II.

Even if I were inclined to agree with the majority's conclusions under the "any hydrological connection" test, I would still dissent because the government's attempt to assert jurisdiction over the Johnsons' wetlands is inconsistent with its own regulations. Courts will not give an agency's interpretation of its regulations deference when that interpretation is inconsistent with the regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994).

The applicable regulations state that "waters of the United States" include "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs

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[25] Although *In re Needham* was dealing with tributaries as opposed to wetlands, the principle for which it stands applies with full force to the Johnsons' wetlands.

(s)(1) through (6) of this section." 40 C.F.R. § 230.3(s)(7) (emphasis added). The government asserts jurisdiction over the Johnsons' wetlands by claiming that they are adjacent to nonnavigable tributaries of the Weweantic River. *See id.* § 230.3(s)(5) and (7). The government's theory—with which the majority agrees—is that "tributaries" as defined in Section 230.3(s)(5) means "tributary system."[26] However, it is undisputed that, for all of the wetlands at issue here, the "tributary system" to which they are adjacent includes other wetlands. The government is thus attempting to assert jurisdiction over wetlands adjacent to other waters that are themselves wetlands, in contravention of its own regulations. We therefore should not accord deference to the government's interpretation and should find that the government does not have jurisdiction over the Johnsons' wetlands.

The majority chooses the latter definition, as it must, because under the former definition, the government could not assert jurisdiction over the Johnsons' wetlands since the

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[26] In its opinion, the majority acknowledge a dispute between the parties as to the definition of "tributaries." The majority states that

> the focus of the interpretive dispute is whether the term "tributaries" . . . refers only to nonnavigable waters that empty directly into a navigable-in-fact water; or does "tributaries" include the waters that the target sites are adjacent to, and the bodies of open water that form part of the chain linking the target sites to the Weweantic River [i.e., the entire "tributary system" of the Weweantic River].

The majority chooses the latter definition, as it must, because under the former definition, the government could not assert jurisdiction over the Johnsons' wetlands since the streams to which they are immediately adjacent do not empty directly into the Weweantic River.

streams to which they are immediately adjacent do not empty directly into the Weweantic River.

The majority's attempt to circumvent this problem is unpersuasive. The majority states that

> a wetland remains a "water of the United States" so long as it is also adjacent to a body of water that is a "water of the United States" that is not a wetland. Here, each target site is *immediately adjacent* to at least one (s)(5) tributary; and every wetland found in the chain of waters connecting the target sites to the Weweantic River is also adjacent to at least one (s)(5) tributary.

(emphasis added). However, it does not matter where in the chain of connections the other wetlands occur or what the Johnsons' wetlands are "immediately adjacent" to. Under the government's theory, the Johnsons' wetlands are adjacent to the entire "tributary system" between the wetlands and the Weweantic River because of the hydrological connection that exists. This tributary system includes other wetlands. Section 230.3(s)(7) plainly states that wetlands adjacent to waters that are themselves wetlands are not covered by the regulations. It says nothing about "immediate adjacency," nor does it matter whether these other wetlands would themselves be considered "waters of the United States."

In short, the majority cannot have it both ways. Either "tributaries" means only waters that flow directly into a navigable-in-fact water, in which case the government could not assert jurisdiction over the Johnsons' wetlands, or "tributaries" means "tributary system," in which case the government cannot assert jurisdiction over the Johnsons' wetlands because the tributary system they are adjacent to includes other wetlands. Because the government's assertion of jurisdiction contradicts its own regulations, we should find in favor of the Johnsons.

III.

The majority's opinion today greatly increases the power of the federal government to regulate the use of waters on private property. It allows the government to go far beyond what Congress intended in enacting the CWA and also raises serious constitutional issues regarding Congress's power under the Commerce Clause. Further, the majority ignores the fact that the government's assertion of jurisdiction is inconsistent with its own regulations. For these reasons, I respectfully dissent.

Appendix E-1

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSSETTS

UNITED STATES OF AMERICA, Plaintiff v. CHARLES JOHNSON, ET AL., Defendants.	Filed May 6, 2004 CIVIL ACTION NO.: 99-12465-EFH

ORDER

HARRINGTON, S.D.J.

Upon review of the documents submitted in this case, the Court grants United States' Motion for Summary Judgment on Liability only. The bases for the Court's ruling are the arguments set forth in United States' Memorandum in Support of its Motion for Summary Judgment on Liability.

SO ORDERED.

/s/ Edward F. Harrington
EDWARD F. HARRINGTON
United States Senior District Judge

Appendix F-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Filed Jan. 13, 2004
	)	
v.	)	
	)	
CHARLES JOHNSON,	)	
FRANCIS VANER JOHNSON,	)	Civil Action No.
GENELDA JOHNSON, and	)	99-12465-EFH
JOHNSON CRANBERRIES	)	
LIMITED PARTNERSHIP, a	)	
Massachusetts limited partnership,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON REMEDY

Upon consideration of the United States' Motion for Summary Judgment on Remedy, the materials in support thereof, and submissions in opposition, the United States' motion is hereby GRANTED.

The Court makes the following determinations with regard to remedy in this case:

1. Defendants Francis Vaner Johnson, Charles Johnson, Genelda Johnson and Johnson Cranberries Limited Partnership shall not discharge pollutants into waters of the United States at the Cross Street Site, Fosdick Street Site, and Forest/Fuller Street Site unless authorized by a permit

in accordance with Clean Water Act Sections 301 and 404, 33 U.S.C. §§ 1311, 1344.

2. Defendants Francis Vaner Johnson, Charles Johnson, Genelda Johnson and Johnson Cranberries Limited Partnership shall perform restoration and mitigation at the Cross Street Site and Forest/Fuller Street Site under the terms, conditions, milestones and schedules contained in the *Restoration Plan for the Cross Street Site and Mitigation Plan for the Forest/Fuller Street Site*, attached to this Order as Attachment 1.

3. Defendants Francis Vaner Johnson, Charles Johnson and Johnson Cranberries Limited Partnership shall pay to the United States a total civil penalty of $75,000 in two installments of $37,500 each. The first installment shall be paid within 60 days of entry of this Order; the second installment shall be made within one year of entry of this Order. Within 30 days of entry of this Order, the United States shall provide written instructions as to the method of making penalty payments as required by this paragraph.

4. This Court shall retain jurisdiction over this action in order to enforce this Order.

IT IS SO ORDERED this 13 day of Jan., 2004.

/s/ Edward F. Harrington
Honorable Edward F. Harrington
United States Senior District Judge

Supreme Court, U.S.
FILED
AUG 31 2007
OFFICE OF THE CLERK

No. 07-9

In the Supreme Court of the United States

CHARLES JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wetlands in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*); 33 U.S.C. 1362(7).

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In the Supreme Court of the United States

No. 07-9

CHARLES JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C19) is reported at 467 F.3d 56. A prior opinion of the court of appeals (Pet. App. D1-D58) is reported at 437 F.3d 157. The orders of the district court (Pet. App. E1, F1-F2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2006. A petition for rehearing was denied on February 21, 2007 (Pet. App. A1-A2). On May 3, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 28, 2007 (see Pet. App. B1), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The district court held that petitioners' unpermitted discharges into wetlands violated the CWA, see Pet. App. E1, and the court of appeals affirmed, see *id.* at D1-D58.

Petitioners moved for rehearing en banc, noting this Court's grant of certiorari in *United States* v. *Rapanos*, 376 F.3d 629 (6th Cir. 2004). See Pet. App. C1. The court of appeals held the rehearing petition in abeyance pending this Court's decision in that case. See *ibid.* Following the decision in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006), the court of appeals granted rehearing, vacated its prior decision, issued a new opinion, and remanded the case to the district court for further proceedings in light of *Rapanos*. Pet. App. C1-C19. Petitioners now seek review of the court of appeals' remand order.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency

(EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos*, *supra*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. See 126 S. Ct. at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

3. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioners had violated the CWA by discharging fill material into wetlands at three sites in Carver, Massachusetts, to construct, expand, and maintain cranberry bogs. Pet. App. D3, D5-D8. The district court entered summary judgment for the United States on the issue of liability, *id.* at E1, and directed petitioners to perform restoration activities and pay a civil fine of $75,000, *id.* at F1-F2.

Petitioners moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that the subject wetlands were not part of "the waters of the United States" for purposes of the CWA. See Pet. App. D3. The district court denied the motion, holding that there was "a sufficient basis for the United States to

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"*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

exercise jurisdiction," given the "undisputed evidence" that the subject waters were "hydrologically connected to the navigable Weweantic River by nonnavigable tributaries." See *ibid.* (quoting district court opinion).

4. The court of appeals affirmed. Pet. App. D1-D58. The court concluded that the hydrological connection between each of the three target sites and the Weweantic River was sufficient to establish jurisdiction under the Clean Water Act and to avoid constitutional issues under the Commerce Clause. *Id.* at D29-D44. Judge Torruella dissented, finding that the United States "may not constitutionally regulate wetlands that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* at D55 (citation and internal quotation marks omitted).

5. Petitioners sought rehearing en banc, and the court of appeals held the rehearing petition in abeyance in light of this Court's grant of certiorari in *Rapanos*. Pet. App. C1. After this Court issued its decision in *Rapanos*, the court of appeals in the instant case vacated its original decision, issued a new opinion, and remanded the case to the district court for further proceedings in light of *Rapanos*. *Id.* at C1-C19. Based on its analysis of the various opinions in *Rapanos*, *id.* at C4-C6, the court of appeals "conclude[d] that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality," *id.* at C7.

In explaining that conclusion, the court of appeals noted this Court's statement in *Marks* v. *United States*, 430 U.S. 188 (1977), that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those

Members who concurred in the judgments on the narrowest grounds." Pet. App. C10 (quoting *Marks*, 430 U.S. at 193). The court of appeals concluded that, for purposes of *Marks* analysis, one ground of decision can reliably be identified as "narrower" than another only when the first rationale is a "logical subset" of the second. *Id.* at C13 (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)). The court further explained that "[t]his understanding of 'narrowest grounds' as used in *Marks* does not translate easily to the present situation" because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at C14. The court of appeals also observed that, "[s]ince *Marks*, several members of [this] Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." *Id.* at C16-C17.

The court of appeals concluded that "[t]he federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." Pet. App. C17. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is satisfied, this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at C14. The court of appeals remanded the case to the district court for application of the standards set forth in the *Rapanos* opinions, noting that "the district court may conduct additional factfinding if it deems it

necessary." *Id.* at C17. The court observed that "the two members of the majority [on the court of appeals panel] each had different interpretations of the record," and it "urge[d] the parties and the district court to provide a clear factual record in the context of applying the new standards." *Id.* at C18.

Judge Torruella concurred in part and dissented in part. Pet. App. C18-C19. He would have held that the standard adopted by the *Rapanos* plurality "provides the proper constitutional limit on federal regulation under the Clean Water Act." *Id.* at C18.

ARGUMENT

Petitioners contend (Pet. 11) that the plurality opinion in *Rapanos*, see 126 S. Ct. at 2225-2227, articulated the "narrowest grounds" for the Court's decision and is therefore controlling in future cases under the principles set forth in *Marks*. Petitioners seek review (see Pet. 7-12) of the court of appeals' holding that, if the wetlands at issue in this case are found to satisfy the "significant nexus" standard articulated in Justice Kennedy's concurring opinion in *Rapanos*, see 126 S. Ct. at 2241, those wetlands are subject to federal regulatory jurisdiction under the CWA, whether or not they also satisfy the plurality's standard. The court of appeals' holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals did not apply this Court's decision in *Rapanos* to the wetlands at issue here, but instead remanded the case to allow the district court to perform that task in the first instance. Although peti-

tioners contend that the court of appeals' remand order announced an erroneous legal standard, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

If the district court on remand concludes that the wetlands at issue in this case satisfy the *Rapanos* plurality's standard for CWA coverage (or that they satisfy neither the plurality's standard nor that of Justice Kennedy), the aspect of the court of appeals' decision that petitioners find objectionable will have no practical impact on the disposition of the case. If the courts below ultimately conclude that the wetlands satisfy Justice Kennedy's standard but not that of the plurality, and if petitioners are subjected to CWA liability on that ground, petitioners can reassert their current challenge in a new petition for a writ of certiorari. Adherence to this Court's usual practice of awaiting the entry of final judgment is particularly appropriate here because *no* court has yet applied the legal standards set forth in *Rapanos* to the wetlands at issue in this case. The court of appeals expressed concern, moreover, that the existing factual record might be inadequate to that task, and it "urge[d] the parties and the district court to provide a clear factual record in the context of applying the new standards." Pet. App. C18. This Court's intervention therefore would be premature at the current stage of the pro-

ceedings, even if the question presented otherwise warranted review.

2. Petitioners contend (Pet. 4, 11) that, under this Court's decision in *Marks*, the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses particular wetlands. That argument lacks merit.

a. Under a proper understanding of *Rapanos*, the Corps and EPA may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks*, this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)); see pp. 6-7, *supra*. Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgment[]" might be read to suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily

stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In those circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. *See Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668-1669 n.15, 1671 (2007) (analyzing concurring

and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).[3]

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). The application of that approach here leads inexorably to the conclusion that regulatory jurisdiction exists whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members

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[3] Petitioners' reliance (Pet. 14) on *King* v. *Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc), is misplaced. In attempting to identify the rule of law established by this Court's fractured decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), the court in *King* stated that it "d[id] not think [it was] free to combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d at 783. That statement was dictum, however, since the court further determined that the approach to contingency enhancements endorsed in the *Delaware Valley II* concurrence "cannot possibly be thought a subset of the dissent's approach to the same issue." *Id.* at 784 n.7. The court in *King* concluded that it had "done [its] best to apply *Delaware Valley II* but ha[d] been unable to derive a governing rule from the opinion." *Id.* at 785. In any event, *King* predates the decisions of this Court cited in the text, which *have* analyzed concurring and dissenting opinions in prior cases to identify rules of law endorsed by a majority of the Court.

would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

b. Petitioners contend that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioners' view, the *Rapanos* plurality's standard states the "*narrowest grounds*" for the Court's holding, Pet. 4 (quoting *Marks*, 430 U.S. at 193), because "the plurality standard is a 'logical subset' of [Justice] Kennedy['s] standard," Pet. 11 (quoting Pet. App. C13). That argument lacks merit.

Contrary to petitioners' contention, the *Rapanos* plurality's standard for CWA coverage is not a "logical subset" of Justice Kennedy's standard. In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossi-

ble to identify a consensus "narrowest" position among the views of the Justices who concurred in the judgment. Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he construed the statute, see *id.* at 2246, 2249. As the court of appeals correctly recognized in the remand order at issue here, that aspect of the *Rapanos* concurrence suggests that there are certain cases in which "the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus." Pet. App. C14; see *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (*Gerke*) (explaining that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1"), petition for cert. pending, No. 06-1331 (filed Apr. 2, 2007).

Moreover, even if all wetlands satisfying the *Rapanos* plurality's standard for CWA coverage would also satisfy Justice Kennedy's "significant nexus" standard, petitioners would still be wrong in contending that the plurality's approach stated the "narrowest grounds" within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest grounds" because it would impose the least restrictive limits on the exercise of regulatory authority by the Corps and EPA, and because it would reflect the narrowest disagreement with the judgments under review in *Rapanos* and with the approach advocated by the four dissenters. In *Marks*, the Court explained that the narrowest ground for decision in *Memoirs* v. *Massachusetts*, 385 U.S. 413 (1966), was the rationale of the *Memoirs*

plurality, which allowed some government regulation of obscene materials, rather than the "broader grounds" urged by Justices Black and Douglas, who would have held "that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193. The Court in *Marks* thus treated the rationale that imposed less sweeping constitutional constraints on the government's authority to regulate obscenity (and that reflected the narrowest disagreement with the judgment under review and with the approaches advocated by the dissenters) as the narrower grounds for the decision in *Memoirs*. Petitioners' contrary suggestion—that the plurality opinion in *Rapanos* must be deemed the narrowest grounds for the *judgment* if it adopted the narrowest view of federal regulatory *jurisdiction* under the CWA—is thus inconsistent with both the logic and the square holding of *Marks* itself.

c. Petitioners contend (Pet. 4, 7-12) that the circuits are divided with respect to the standard to be used in identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Contrary to petitioners' contention, the First Circuit's decision in this case does not squarely conflict with any decision of another court of appeals. In any event, the other courts of appeals that have considered the issue have rejected the proposition, advanced by petitioners in this case, that wetlands satisfying Justice Kennedy's legal standard but not that of the *Rapanos* plurality fall outside the CWA's coverage.

Petitioners assert (Pet. 4, 7, 9) that the court of appeals' application of *Marks* principles to the various opinions in *Rapanos* conflicts with the Seventh Circuit's decision in *Gerke*. In remanding the government's CWA en-

forcement action to the district court for further proceedings in light of *Rapanos*, the Seventh Circuit in *Gerke* stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." 464 F.3d at 725. The court observed that

> any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality).

Ibid. The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*; see p. 14, *supra*, and it did not specify what it regarded as the proper disposition of such a case. The Seventh Circuit thus did not squarely reject the view, adopted by the First Circuit in this case, that federal regulatory jurisdiction under the CWA extends to all wetlands that are covered by either the *Rapanos* plurality's standard or that of Justice Kennedy. In any event, the decision in *Gerke* is flatly inconsistent with petitioners' contention that the *Rapanos* plurality's standard provides the *only* controlling rule of law.

Petitioners' reliance (Pet. 4) on *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), is also misplaced. On August 6, 2007, after the petition for a writ of certiorari in the instant case was filed, the Ninth Circuit withdrew its original opinion in *City of Healdsburg* and issued a new opinion in its place. See *Northern Cal. River Watch* v. *City of Healdsburg*,

No. 04-15442, 2007 WL 2230186. In its new opinion, the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling rule of law *for our case*." *Id.* at *6 (emphases added). The Ninth Circuit thus carefully refrained from stating a categorical rule concerning the import of the fractured opinions in *Rapanos*, and it did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See *id.* at *6-*7. Like the Seventh Circuit's decision in *Gerke*, moreover, the amended opinion in *City of Healdsburg* provides no support for petitioners' contention that the *Rapanos* plurality's standard constitutes the sole controlling rule of law.

Thus, the First, Seventh, and Ninth Circuits all agree that wetlands satisfying Justice Kennedy's "significant nexus" standard are covered by the CWA. In the instant case, the First Circuit squarely held that the CWA *also* encompasses wetlands that satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. See Pet. App. C14 (explaining that, if the CWA term "waters of the United States" were read to exclude such wetlands, "there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation"). No other court of appeals has specifically addressed the proper treatment under *Rapanos* of

wetlands that satisfy the plurality's standard but not that of Justice Kennedy. But even if a circuit conflict existed with respect to the CWA's application to that category of wetlands, the instant case would be an unsuitable vehicle to resolve the question. That is so both because it is currently unclear whether petitioners' own wetlands fall within that category (see pp. 8-9, *supra*), and because petitioners *agree* with the United States that wetlands in that category are covered by the CWA.

4. Petitioners contend that the "significant nexus" standard in Justice Kennedy's opinion "raises due process concerns" because it provides insufficient guidance to regulated parties. Pet. 14; see Pet. 14-17. Under settled legal principles, however, petitioners can prevail in such a challenge only by showing that the CWA term "waters of the United States," if construed in accordance with Justice Kennedy's "substantial nexus" standard, would be unconstitutionally vague as applied to petitioners' *own* conduct. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). Although petitioners assert (Pet. 17) that the standard articulated in Justice Kennedy's concurrence "is sure to result in inconsistent and unpredictable applications" in future cases, petitioners make no effort to demonstrate that the "significant nexus" standard is impermissibly vague as applied to the circumstances of this case. In any event, because no court has yet applied the "significant nexus" standard to the wetlands at issue here, this Court's consideration of petitioners' due process claim would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

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SUPREME COURT, U.S.

No. 07-9

In the

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON, FRANCIS VANER JOHNSON, and JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION

In this case the First Circuit held that jurisdiction under the Clean Water Act may be established using the test announced in Justice Scalia's plurality opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), or Justice Kennedy's concurring opinion in the same case. The First Circuit's holding squarely conflicts with the views of the Seventh and Ninth Circuits. Petitioners have a significant interest in the Court's immediate resolution of this conflict: as it now stands, Petitioners must defend against jurisdiction using two distinct tests, thus for practical purposes doubling pre-trial discovery work and substantially increasing total litigation costs. The Court's deciding of the issue now would also serve judicial economy and the rule of law by resolving a circuit split of capital importance. And the Court need have no fear of acting prematurely, because the issue presented for review is purely legal and the Court's resolution would not be aided by additional factual development.

ARGUMENT

Contrary to the government's contention, the question presented is not simply whether Petitioners' cranberry bogs are "waters of the United States." Rather, this Court is asked to act consistent with its traditional role as arbiter of the rule of the law and resolve an existing circuit split regarding the interpretation of *Rapanos*. None of the reasons advanced by the government for denying the writ is convincing.

I

GRANT OF THE WRIT IS APPROPRIATE NOTWITHSTANDING THE CASE'S INTERLOCUTORY POSTURE

The government contends that the interlocutory posture of this case is sufficient reason not to review the First Circuit's decision. That is no doubt the general rule, *see, e.g.*,

Am. Constr. Co. v. Jacksonville, T. & K. W. RY. Co., 148 U.S. 372, 384 (1893), but where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stern, et al., *Supreme Court Practice*, 196 (7th ed. 1993) (citing numerous authorities). Here, Petitioners present both an important and clear-cut issue: which jurisdictional test announced in *Rapanos* is controlling. That issue is fundamental to the conduct of further proceedings in this case because, as noted above, the requirement to defend against two distinct jurisdictional arguments greatly increases the pretrial and trial work in this case, and imposes a significant burden on Petitioners. That burden would be removed by this Court's decision to review the issue now, and nothing would be gained by the Court's waiting to address the issue until after final judgment has been entered. Although it may turn out that jurisdiction is lacking over Petitioners' cranberry bogs under either the Scalia or Kennedy test, the case's ultimate resolution in Petitioners' favor will not compensate them for the considerable expenditure of time and effort in the trial court defending against jurisdiction under two contrary tests. Therefore, immediate review of the First Circuit's decision is warranted.

II

GRANT OF THE WRIT IS APPROPRIATE GIVEN THE COURT OF APPEALS' MISINTERPRETATION OF *MARKS* AND *RAPANOS*

The government contends that Justice Scalia's plurality opinion in *Rapanos* is not controlling under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), and therefore there is no reason for this Court to review the First Circuit's judgment. That argument is without merit.

Under *Marks*, when no opinion of this Court enjoys the support of a majority of the Justices, the case's holding may be taken as "that position . . . by those Members who concurred in the judgment[] on the narrowest grounds." *Id.* (internal quotation marks omitted). The government erroneously interprets *Marks* to divine two controlling—and contradictory—rules in *Rapanos*. Opp'n at 10-13. The government's error derives from two points: one, neither the *Rapanos* plurality opinion nor the concurring opinion of Justice Kennedy is a logical subset of the other; and two, when conducting the *Marks* inquiry, it is appropriate to refer to the views of dissenting Justices.

On the first point, Justice Scalia's test is fairly considered a logical subset of Justice Kennedy's test, because in probably all circumstances where jurisdiction obtains under Justice Scalia's opinion, the same will be true under Justice Kennedy's test. *See Rapanos*, 126 S. Ct. at 2235 n.15. Although some have argued that Justice Kennedy's test could be read in theory to be, on the rare occasion, a subset of the plurality test, two of the circuit courts to have addressed that issue have dismissed its importance. *See United States v. Gerke Excavating Co.*, 464 F.3d 723, 725 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, No. 04-15442, 2007 WL 2230186, at *6 (9th Cir. Aug. 6, 2007). Further, the government's interpretation of *Marks*, *see* Opp'n at 14-15, here suffers from the same unfounded supposition noted by the court of appeals below, namely, "narrowest grounds" must translate to "least restrictive" of federal authority. *See United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006).

On the second point, the government attempts to justify the lower court's interpretation of *Rapanos* (an interpretation, again, at odds with that of the Seventh and Ninth Circuits) by attempting to cobble together a rule of law from a melange of plurality, concurring, and dissenting opinions. *See* Opp'n at 11-12 . *See also Johnson*, 467 F.3d at 65-66. The government's

efforts are flawed both because they are unfaithful to *Marks*, and, perhaps more significantly, are inconsistent with basic principles of Article III jurisprudence. *Marks* itself states plainly that the analysis must hinge upon the views of those Justices concurring in the *judgment*; obviously, the views of dissenting Justices would not so qualify. *See King v. Palmer*, 950 F.2d 771, 793 (D.C. Cir. 1991) (en banc). And reliance upon dissenting Justices' views as part of the *Marks* inquiry is unfounded also because federal courts may only expound the law to the extent that their opinions are tied to a judgment; that is, to the extent that the courts resolve an actual "Case or Controversy." Given that the views of dissenting justices have no effect, by definition, on the Court's disposition of an actual case or controversy, it follows that their views as to the controlling rule of law are without binding power.

In this case, however, the First Circuit determined both that *Rapanos* contains no "logical subset" opinion, *see Johnson*, 467 F.3d at 63-64, and that reliance upon the views (or at least the votes) of the *Rapanos* dissenters is appropriate. The government advances the same position in opposing the writ. Yet the First Circuit's decision both creates a circuit split and misconstrues the *Marks* inquiry. That the three courts of appeals to have applied *Marks* to *Rapanos* have produced conflicting decisions, and thus inconsistent jurisdictional tests, confirms the appropriateness of this Court's review.

III

GRANT OF THE WRIT IS APPROPRIATE BECAUSE THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THAT OF THE SEVENTH AND NINTH CIRCUITS

The government contends that the First Circuit's decision does not conflict with that of Seventh or Ninth Circuit because all three courts determined that jurisdiction can be established under Justice Kennedy's test, and because the Seventh and

Ninth Circuits purportedly declined to rule on whether the plurality approach is also appropriate. *See* Opp'n at 15-18. The government's characterizations of the Seventh Circuit's decision in *Gerke* and the Ninth Circuit's decision in *Healdsburg* are inaccurate, for two reasons.

First, regardless of the government's interpretations, the *First Circuit* itself recognized the difference between its views and those of the Seventh and Ninth Circuits. *See Johnson*, 467 F.3d at 64 (noting that Seventh and Ninth Circuits advocate "Justice Kennedy's test [as] the single controlling test").

Second, the government's seizing upon the allegedly limiting language in the *Gerke* and *Healdsburg* opinions is inappropriate. To be sure, *Gerke* noted that in a "rare case" a given wetland would pass jurisdictional muster under the *Rapanos* plurality test but not Justice Kennedy's. *See Gerke*, 464 F.3d at 725. But that was based on a mischaracterization of the plurality test. Under that test, a small and remote surface water connection would never suffice to establish federal jurisdiction. To the contrary, the plurality determined the Clean Water Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters and only those wetlands abutting these water bodies such that the wetland and the covered water are "indistinguishable." *Rapanos*, 126 S. Ct. at 2225, 2234 (plurality opinion). In contrast, the Kennedy test places no limits on physical proximity to navigable-in-fact waters and does not even require a hydrological connection to any tributary to a navigable-in-fact water. Moreover, the *Gerke* court used that "practical" (if incorrect) observation to buttress its *legal* conclusion that the Kennedy test—and that alone—is controlling. *See Gerke*, 464 F.3d at 724 (concluding that under *Marks* Justice Kennedy's opinion represents the narrowest grounds and therefore is the opinion "lower-court judges are to

follow"). A similar analysis pertains to the Ninth Circuit's decision in *Healdsburg*. Indeed, *Healdsburg* expressly adopted *Gerke*'s reasoning on this point. *See Healdsburg*, 2007 WL 2230186, at *6 (noting that Justice Kennedy's concurrence constitutes the "narrowest ground").

Thus, this Court is presented with two conflicting rules, developed by the courts of appeals in the months following *Rapanos*: (1) jurisdiction may be established under either the plurality test or that of Justice Kennedy; or (2) jurisdiction must be established under Justice Kennedy's test. The writ should therefore be granted to resolve this pressing conflict.

IV

GRANT OF THE WRIT IS APPROPRIATE BECAUSE THE "SIGNIFICANT NEXUS" TEST RAISES SERIOUS DUE PROCESS CONCERNS

The government dismisses Petitioners' fears of potential violations of due process through the inconsistent application of Justice Kennedy's "significant nexus" test because Petitioners have purportedly failed to demonstrate that the test is impermissibly vague. *See* Opp'n at 18. Yet the government ignores the conclusions of one district court and the dissent below, who made related points. *See United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (significant nexus test "leaves no guidance on how to implement its vague, subjective centerpiece"); *Johnson*, 467 F.3d at 66 (significant nexus test "leaves the door open to continued federal overreach") (Torruella, Circuit Judge, dissenting). The inconsistent and unpredictable results to be expected from the application of Justice Kennedy's "significant nexus" test, a test whose use was authorized by the court below, stand as sufficient reason for this Court's review.

CONCLUSION

Petitioners' case presents two important and related questions for review: when and how is *Marks* to be applied, and what is the controlling rule of law in *Rapanos*. The courts of appeal are split on both questions. Review of those questions will affect in one manner or another citizens throughout the country; a deferred resolution of those issues will, broadly speaking, impose a great burden on the regulated public, and, in terms of this case, place a significant hardship on Petitioners. Therefore, the writ of certiorari should be granted.

DATED: September, 2007.

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No. 07-9

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON, FRANCIS VANER JOHNSON, and JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, following *Rapanos v. United States*, courts should apply the plurality's test, the broader test outlined in Justice Kennedy's concurrence, or both tests, to determine the jurisdictional reach of the Clean Water Act?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public-interest law firm dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act[2] ("CWA"), are implemented and enforced in a manner consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

[2] Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387.

SUMMARY OF THE ARGUMENT

The jurisdictional reach of the CWA has been the source of much litigation. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208 (2006). Despite the abundance of litigation, courts have reached widely disparate results when faced with questions of the jurisdictional reach of the CWA. *See, e.g.*, *Northern California River Watch v. Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (man-made waste pond was under CWA jurisdiction based upon "significant nexus" with Russian River, when hydrological connection was through aquifer); *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D.Tex. 2006) (streambed that carried water only during periods of heavy rainfall, and only eventually drained into navigable water, was not within CWA jurisdiction); *see also* Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing The Two-Part Test*, 75 Fordham L. Rev. 3295 (2007) (discussing confusion in lower courts about the reach of CWA jurisdiction generally, and the proper application of *Rapanos*, specifically).

Traditionally, this Court has limited the CWA's jurisdictional reach to waters that have some substantial effect on navigable or interstate waters. *SWANCC*, 531 U.S. at 167-168 (discussing *Riverside Bayview*). However, this Court's most recent decision in this area, *Rapanos*, did not command a majority. *Rapanos*, 126 S.Ct. 2208. Further, the "significant nexus" test elaborated by Justice Kennedy in his *Rapanos* concurrence is ambiguous and is applied out of context such that courts appear to conform to his guidance simply by phrasing their decisions in terms of a

"significant nexus" while extending jurisdiction to waters that have, at most, an insubstantial connection to waters of the United States. *United States v. Fabian*, ___ F.Supp.2d ___, 2007 WL 1035078 (N.D.Ind. 2007) (court upheld CWA jurisdiction, based upon the presumption of a significant nexus, over a wetland separated from a ditch by a 15-foot-high, 130-foot-wide levee). These lower court holdings are out of accord with the statute, the Corps's regulations, and the precedent set by this Court; thus, *certiorari* should be granted. Rina Eisenberg, *Recent Developments in Environmental Law, Clean Water Act*, 20 Tulane Envtl. L.J. 459, 467 (2007).

Moreover, the consequence of an overly broad or inconsistent finding of CWA jurisdiction is that landowners who wish to modify the use of their own property may find that to do so, even though not statutorily mandated, the Corps will require that they obtain a federal permit, thus needlessly subjecting them to federal oversight and substantial costs. *See, e.g.*, *Healdsburg*, 457 F.3d at 1030-1032 (court upheld Corps's assertion of jurisdiction over pond based upon hydrological connection, via groundwater, with navigable-in-fact river); *Fabian*, 2007 WL 1035078 (court affirmed the Corps's assertion of jurisdiction over wetlands separated from ditch by 130-foot-wide levee).

———◊———

ARGUMENT

I. LEGAL BACKGROUND.

A. Congress Granted the Corps Limited Authority Under the CWA.

The 1972 Clean Water Act Amendments amended the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, *et seq.*, which was itself an enlargement of the federal control over navigable waters provided by the River and Harbors Act, 33 U.S.C. §§ 401, *et seq.* The previous legislation allowed the Corps to regulate the addition of "pollutants" into navigable waters, including harbors and tidal waterways. Gregory T. Broderick, *From Migratory Bird to Migratory Molecule*, 30 Colum. J. Envtl. L. 473 (2005) (discussing the history of Federal jurisdiction under the CWA and how it was limited to navigable-in-fact waters until *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975)). The jurisdictionally limiting phrase "navigable waters of the United States" meant waters upon which "commerce of a substantial and permanent character" was conducted, *i.e.*, navigable-in-fact waters. *Leovy v. United States*, 177 U.S. 621, 632 (1900). The phrase was premised upon the limited constitutional authority granted Congress, "[t]he power of Congress to regulate such waters [was] not expressly granted in the Constitution, but [was] a power incidental to the express 'power to regulate commerce.'" *Id.* The term "pollutants," however, was read broadly to include sand, dirt, and fill material that might obstruct navigation on these waterways. *Id.* at 478.

However, with the CWA, Congress defined "navigable waters," not as "those upon which commerce of a substantial and permanent character is conducted," but as "the

waters of the United States." 33 U.S.C. § 1362(7). Instead of excising the limiting term "navigable waters," Congress chose to broaden it. *SWANCC*, 531 U.S. at 167. Interpretation of "navigable waters" has since been expanded to include "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133 (emphasis added). In order to grant the Corps the power necessary "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the CWA reached waters beyond the scope of earlier legislation; however, it also recognized the primacy of the states to regulate their own land and water, and must be understood in this context. 33 U.S.C. § 1251(a), (b).

The terms Congress employed had preexisting meaning and have been used by the Corps for over 100 years. *See, e.g.*, *The Daniel Ball*, 77 U.S. 557, 563 (1870). It was not until the United States District Court for the District of Columbia demanded the Corps give the term a broader definition that the Corps began to regulate beyond the traditional "navigable waters." *See Callaway*, 392 F.Supp. at 686 (directing the Corps to draft new regulation consistent with the CWA, and to revoke regulations that placed "limits [on] the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States'"). With regard to other Corps's responsibilities, however, the term "navigable waters" retains its historical meaning. *See, e.g.*, 33 U.S.C. § 401 (mandating that bridges, causeways, and dams on waters that are, or can be, used to transport interstate commerce be approved by the Chief of Engineers).

In response to the decision in *Callaway*, the Corps promulgated regulations that, while broader in reach than

earlier regulations, still retained the primacy of "navigable waters." 33 C.F.R. § 328.3. These regulations use the term "waters of the United States" for efficiency, instead of the term "navigable waters"; however, under the CWA, these two terms are synonymous. 33 U.S.C. § 1362(7). The Corps's regulations provide general categories of water and land that fall within the CWA, and all of the included categories refer recursively either back to waters used in interstate commerce or to their tributaries. 33 C.F.R. § 328.3(a).

B. This Court Has Held Consistently that the CWA's Jurisdictional Reach Is Limited by the Constitution and Its Own Terms to Navigable-in-Fact Waters and Waters that Significantly Affect Them.

On three occasions, this Court has reviewed the Corps's assertion of jurisdiction under the CWA. In the first case, this Court overruled the Sixth Circuit Court of Appeals' overly restrictive holding. *Riverside Bayview*, 474 U.S. at 139. In the next two cases, this Court overruled the Courts of Appeal for the Sixth and Seventh Circuits' acceding to the Corps's overreach. *SWANCC*, 531 U.S. at 174; *Rapanos*, 126 S.Ct. at 2235. In each instance, this Court recognized that the CWA's jurisdiction is limited.

1. *United States v. Riverside Bayview Homes, Inc.*

In the first instance, *Riverside Bayview*, this Court reversed a Sixth Circuit Court of Appeals' decision that exempted a property that was squarely within the Corps's guidelines and the terms of the CWA. 474 U.S. at 135.

This Court held that a wetland adjacent to, and "inseparably bound up" with, a navigable-in-fact river was within the CWA's jurisdiction. *Id.* However, this Court restricted its holding to the facts of that case, stating that it was not addressing whether other waters were within the CWA's jurisdiction. *Id.* at 131. Based upon the language, policies, and history of the CWA, this Court found that the wetlands at issue were "inseparably bound up" with navigable waters and, thus, were within the CWA's jurisdiction. *Id.* at 135-136.

This Court stated that the term "navigable" was of limited import, but nonetheless premised its decision upon the fact that the CWA was intended to cover "at least *some* waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133 (emphasis added). Implicit in this statement is that regulation of waters that are not, in fact, navigable is the exception and not the rule. Similarly, this Court acknowledged that not all wetlands adjacent to navigable waters would have a "great" effect on those navigable waters. *Id.* at 135. However, this Court held that the basis for including those wetlands in the CWA's jurisdiction was, in the "majority" of cases, that they would have a "great" effect on those waters. *Id.* Even then, this Court justified its categorical inclusion of wetlands adjacent to navigable-in-fact waters based upon the Corps's ability to grant fill permits for wetlands that did not fit the generalization. *Id.*

2. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers.*

This Court reaffirmed the holding of *Riverside Bayview* with its decision in *SWANCC*. The Corps, in *SWANCC*,

denied a fill permit to a solid waste disposal group because the abandoned gravel pit in question purportedly hosted various species of migratory birds, even though the waters were man-made, non-navigable, isolated, intrastate ponds. 531 U.S. at 162. The Corps asserted CWA jurisdiction over any water or wetland, regardless of its relation to navigable waters, based upon the presence of birds that might cross state lines or that might draw tourists from across state lines, using the so called "Migratory Bird Rule." *Id.* at 164.

This Court characterized the relationship between a wetland and adjacent navigable-in-fact waters such that no boundary could be drawn between the two as a "significant nexus." *Id.* at 167. This Court acknowledged that the discussion in *Riverside Bayview* of the term "navigable" being of limited importance could not be conclusive as "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. This Court held that the "Migratory Bird Rule" impermissibly extended CWA jurisdiction based upon the presence of birds that cross state lines. *Id.* at 174. In so doing, this Court held that a pond, remote from any interstate or navigable water, could not be within the CWA's jurisdiction because it lacked the "significant nexus" of the water. *Id.* (citing *Riverside Bayview*). This Court held that such waters were outside the scope of the CWA, and, even if they were not, assertion of federal jurisdiction over waters wholly unrelated to interstate waters would raise serious constitutional concerns. *Id.*

3. *Rapanos v. United States.*

Most recently, building upon the framework of *Riverside Bayview* and *SWANCC*, this Court struck down yet another attempt by the Corps to extend CWA jurisdiction. In *Rapanos*, the Corps asserted jurisdiction over waters with *any* purported hydrological connection to navigable-in-fact waters, *Rapanos*, 126 S.Ct. at 2219; however, this Court overturned and remanded the Sixth Circuit's affirmance of the Corps's jurisdiction over wetlands that were as far as 20 miles from navigable-in-fact waters. *Id.* at 2214. The wetlands at issue were connected to navigable water via drainage ditches over which the Corps had asserted jurisdiction, again based upon a purported hydrological connection, arguing that the drainage ditches were waters of the United States. *Id.* at 2219. This Court also vacated and remanded the companion case, *Carabell v. United States Corps of Engineers*, in which the Corps asserted jurisdiction over a wetland with no surface connection – except during flooding – to an adjacent intermittent ditch. *Id.* This Court refused to uphold the rule that a hydrological connection could, by itself, bring a water body within "waters of the United States." *Id.* at 2235.

Rapanos, however, was a plurality opinion. The plurality concluded that the CWA's jurisdiction "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 2225 (brackets and ellipses in original omitted). Moreover, the plurality would find CWA jurisdiction only over wetlands that "ha[ve] a continuous surface connection with that water, making it difficult to

determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227.

Concurring in the judgment, Justice Kennedy would extend CWA jurisdiction to all "wetlands" except those that have only a speculative or insubstantial effect on waters that are more conventionally understood as navigable. *Id.* at 2248 (Kennedy, J., concurring). Under Justice Kennedy's approach, CWA jurisdiction would be presumed where a wetland was adjacent to a navigable-in-fact body of water, regardless of any actual effects of the wetlands on the navigable water. *Id.* at 2249. In addition, Justice Kennedy would allow inclusion of wetlands, if, when aggregated with "similarly situated waters," the effects would be significant. *Id.* at 2248. Justice Kennedy premised this grant of jurisdiction upon the stated goal of the CWA to regulate the biological, chemical, and physical integrity of navigable waters. *Id.* In short, under Justice Kennedy's approach, jurisdiction is premised upon the possible effect that pollution – including dredge and fill material – may have on waters used in interstate commerce. *Id.*

This Court's precedent consistently has retained the limiting term "navigable waters" when examining the jurisdictional reach of the CWA. This Court held that waters that were indistinguishable from navigable waters – in the sense that no boundary could be drawn – fell within the jurisdictional reach of the CWA based upon a connection to, and effect upon, those navigable waters. *Riverside Bayview*, 474 U.S. at 135. In *SWANCC,* this court demanded a retrenchment of the Corps's jurisdiction, one that would exclude land and water wholly unconnected with navigable waters. *SWANCC*, 531 U.S. at 168. Finally, in *Rapanos*, this Court again limited CWA

jurisdiction, requiring more than a mere hydrological connection between the waters sought to be regulated and jurisdictional waters. *Rapanos*, 126 S.Ct. at 2226, 2249.

II. THIS COURT SHOULD GRANT THE *WRIT OF CERTIORARI* BECAUSE, SINCE *RAPANOS*, LOWER COURTS HAVE DETERMINED THE JURISDICTIONAL REACH OF THE CWA INCONSISTENTLY, RESULTING IN A DISPARATE APPLICATION OF THE CWA.

Courts have split as to how to interpret and apply *Rapanos*. *See* Romigh, 75 Fordham L. Rev. at 3306 ("The few cases decided since *Rapanos* illustrate continuing confusion regarding the extent of the Corps's jurisdiction under the CWA."). The result of this split is, as Chief Justice Roberts predicted in *Rapanos*, that jurisdiction is now determined on a case-by-case basis. 126 S.Ct. at 2236 (Roberts, C.J., concurring). Since *Rapanos*, each court faced with a CWA jurisdictional issue has elected to apply either Justice Kennedy's concurrence, both the plurality and Kennedy's concurrence, or, on at least one occasion, neither. Some courts have found jurisdiction based upon the mere adjacency of a wetland to a water of the United States pursuant to Justice Kennedy's approach. *See, e.g.*, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (remanding case to be decided according to Justice Kennedy's "significant nexus" test, without any reference to limitations based upon *Riverside Bayview*, or *SWANCC*). Some, such as the Ninth Circuit, have examined the relationship between a body of water and the biological, chemical, and physical integrity of navigable waters to establish jurisdiction. *See, e.g.*, *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir.

2007) (examining whether the pond in question had any effect on nearby navigable slough to determine a "significant nexus" between the two). Others, such as the First Circuit, have looked to either the Plurality's test or Justice Kennedy's test to establish jurisdiction. *See, e.g.*, *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006), *vacated*, 467 F.3d 56 (1st Cir. 2006). Yet others have declined to apply *Rapanos* at all. *See, e.g.*, *Chevron Pipe Line Co.*, 437 F.Supp.2d at 605 (declining to apply holding of *Rapanos*, instead applying existing Fifth Circuit precedent).

In *United States v. Gerke Excavating, Inc.*, the Seventh Circuit held that the "significant nexus" test was the narrower test – in terms of limiting the Corps's authority – and hence was the appropriate test to apply. 464 F.3d 723 (citing *Marks v. United States,* 430 U.S. 188 (1977) (when no single opinion commands a majority of the Court, lower courts should look to the narrowest decision)). The court, therefore, remanded the decision with instruction that the district court follow Justice Kennedy's concurrence. *Id.* The Seventh Circuit impliedly assumed that any decision consistent with Justice Kennedy's concurrence would necessarily comport with *SWANCC* and *Riverside Bayview* as well.

Similarly, the Northern District of Indiana followed the lead of the Seventh Circuit in *United States v. Fabian* and upheld CWA jurisdiction by applying Justice Kennedy's concurrence. ___ F.Supp.2d ___, 2007 WL 1035078 (N.D.Ind. 2007). The court held that the defendant had filled a wetland in violation of the CWA. *Id.* at *16. Fabian's wetland, even though separated by a levee 15 feet high and 130 feet wide, nevertheless was considered adjacent to "Burn's Ditch." *Id.* at *13. The court held that this ditch, as shallow as nine inches, was navigable by

canoe, and thus navigable-in-fact for purposes of the CWA. *Id.* at *15. To find jurisdiction, the court determined that Justice Kennedy's concurrence in *Rapanos* was the determinative holding. *Id.* at *14. Because Justice Kennedy would presume the presence of a "significant nexus" whenever a wetland was adjacent to a navigable body of water, the court did not address whether a "significant nexus" actually existed; instead, the court concluded that the wetland was a "water of the United States." *Id.* at *13. Like Justice Kennedy in *Rapanos*, the court simply assumed that a wetland geographically near a body of "water" is not isolated, and thus had a significant effect on navigable waters. Therefore, the court held that the Corps was justified in regulating the property. *Id.* at *15.

The Court of Appeals for the Ninth Circuit, in contrast, has applied a modified version of Justice Kennedy's test to determine CWA jurisdiction. *Healdsburg*, 457 F.3d at 1029. Despite that the man-made pond in question and a navigable-in-fact river were adjacent – separated by a levee as little as 50 feet wide in places and would therefore be presumed to have a "significant nexus" according to Justice Kennedy – the court examined whether the pond significantly affected the chemical integrity of the adjacent river. *Id.* at 1030. The court examined not just the effects that the pond might have on the Russian River, but also examined the effect of the pond in conjunction with that of nearby wetlands. *Id.* at 1026. The court held, because the Corps showed that water from the pond seeped into the River, there was a significant nexus. *Id.* at 1031. The nexus between the pond and the river, though, was primarily due to groundwater seepage and only occasionally

due to breaches in the levee during flooding.[3] *Id.* Despite the reliance on non-jurisdictional waters – groundwater – the court looked to the *actual* effect of the water in question and a navigable-in-fact river and did not just assume a "significant nexus." Thus, the Ninth Circuit found jurisdiction based upon a test that is neither true to Justice Kennedy's concurrence in *Rapanos*, nor consistent with precedent excluding groundwater from the CWA's reach.

The Ninth Circuit later applied the same modified version of Justice Kennedy's test when an environmental group attempted to force the Corps to exercise jurisdiction over a wastewater pond near a navigable slough that emptied into San Francisco Bay. *San Francisco Baykeeper*, 481 F.3d 704-710. The man-made wastewater pond in question was separated from a navigable-in-fact slough, a tributary of San Francisco Bay, by a levee. *Id.* at 702. The Corps failed to show that water from the pond ever entered the slough. *Id.* at 705. As in *Healdsburg*, the court refused to presume a "significant nexus" based upon mere adjacency. Accordingly, the Ninth Circuit held that the pond was not within CWA jurisdiction because the connection between the pond and the slough was, at best, speculative. *Id.* at 708.

Yet other courts have adopted Justice Stevens's suggestion, in his dissenting opinion in *Rapanos*, and have

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[3] Courts have held consistently that groundwater falls outside of the CWA's jurisdiction. *See, e.g., Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-966 (7th Cir. 1994) (rejecting CWA jurisdiction over an artificial retention pond with only a groundwater connection to other waters because "[n]either the Clean Water Act nor the EPA's definition asserts authority over groundwaters").

examined both the plurality's and Justice Kennedy's tests to determine CWA jurisdiction. *Rapanos*, 126 S.Ct. at 2264-2265 (Stevens, J., dissenting). However, unlike the Ninth Circuit in *Healdsburg*, these courts do not require a showing of both adjacency and a "significant nexus." *See, e.g.*, *Johnson*, 467 F.3d at 57. In the case at bar, for example, the First Circuit examined how other courts have applied *Rapanos*. *Johnson*, 467 F.3d at 60-62. The court concluded that the best method to determine CWA jurisdiction would be – as per Justice Steven's *Rapanos* dissent – to find jurisdiction whenever a majority of this Court might find jurisdiction proper. *Id.* at 65. The court went on to remand the case to be decided according to either the plurality's test or Justice Kennedy's "significant nexus" test. *Id.* at 57. The court held that jurisdiction could be based upon either test because, under either test, the four *Rapanos* dissenting Justices would likely find jurisdiction proper, thus resulting in a majority of this Court finding jurisdiction. *Id.* at 65.

The District Court for the District of Connecticut, examining *Johnson*, held that the First Circuit's application of either test for CWA jurisdiction was a reasoned approach. *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F.Supp.2d 219 (D.Conn. 2007). The court held that the wetland on the defendant's property was near, but not adjacent to, a navigable-in-fact river, thus a "significant nexus" could not be presumed. The court also held that, because the plaintiffs failed to show that the defendant had caused lead contamination into the adjacent navigable river, no "significant nexus" between the two existed. *Id.* at 230. Thus, jurisdiction was lacking under Justice Kennedy's test. *Id.* Moreover, the court also

held that, because there was no continuous surface connection between the wetlands in question and the adjacent navigable river, CWA jurisdiction was also lacking under the plurality's test. *Id.* at 229. Because neither *Rapanos* test was satisfied, the court held that the wetland in question was outside the jurisdiction of the CWA. *Id.* at 229-230.

Standing in stark contrast to the approaches of other courts is that of the Northern District of Texas. In *United States v. Chevron Pipe Line Co.*, the court declined to apply either of the tests outlined in *Rapanos*. 437 F.Supp.2d 605 (N.D.Tex. 2006). The court implicitly accepted that Justice Kennedy's concurrence was controlling, but held that the "significant nexus" test was too ambiguous to apply to the case before it. *Id.* at 613-614 ("This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"). Instead, following Chief Justice Robert's concurrence, the court applied its pre-*Rapanos* precedent to determine the scope of the CWA. *Id.* The Fifth Circuit, in cases decided prior to *Rapanos*, interpreted this Court's CWA precedent strictly, denying CWA jurisdiction where waters were only intermittently connected to navigable waters. *See, e.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) (declining CWA jurisdiction based upon oil leaks onto dry land, intermittent streams, and groundwater). The court applied this pre-*Rapanos* precedent to find jurisdiction lacking.

In summary, the Seventh Circuit and the Northern District of Indiana have applied Justice Kennedy's concurrence to determine CWA jurisdiction after *Rapanos*. The

Ninth Circuit applies a modified version of Justice Kennedy's test, requiring the presence of adjacency and a "significant nexus" to establish CWA jurisdiction. The First Circuit and the District of Connecticut have followed Justice Steven's *Rapanos* dissent and apply either Justice Kennedy's test or that of the plurality to establish jurisdiction under the premise that the four dissenting Justices in *Rapanos* would concede jurisdiction when either of the other two tests are satisfied. Finally, the Northern District of Texas continues to apply the pre-*Rapanos* precedent of the Fifth Circuit to determine CWA jurisdiction.

CONCLUSION

The CWA was meant to be a comprehensive, uniform means of addressing water pollution nationally. 33 U.S.C. § 1252(a). Nonetheless, as a result of the Corps's practices and the courts' erratic application of this Court's precedent, we have a fractious, unpredictable law. Jurisdictional determinations vary by court: it may be found over waters hundreds of miles removed from any navigable water, yet may be denied over waters a few hundred feet removed from a major navigable thoroughfare. While groundwater is exempted from CWA regulation, a groundwater connection has been used as a basis for finding a "significant nexus" and thus CWA jurisdiction. Moreover, the application of *Rapanos*, in conjunction with *Riverside Bayview* and *SWANCC*, varies by court. Absent a decision by this Court, the Corps will continue to regulate without meaningful oversight. Lower courts will continue to apply this Court's ruling in *Rapanos* in an irregular manner, utilizing different tests on a case-by-case, circuit-by-circuit

basis. This Court should grant *certiorari* in order to clarify the reach of the CWA.

Respectfully submitted,

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September 4, 2007